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# CONNIE REIMERS-HILD, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

741 N.W.2d 155

Filed November 9, 2007. No. S-06-203.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Limitations of Actions: Insurance: Motor Vehicles.** Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004) bars as untimely an insured's claim for uninsured or underinsured motorist benefits when the statute of limitations on the underlying claim against the uninsured or underinsured motorist has expired.
3. **Limitations of Actions: Insurance: Motor Vehicles: Tort-feasors.** The purpose underlying Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004) is the protection of the insurer when it may have to pay uninsured or underinsured motorist benefits. The statute makes it the responsibility of the insured to preserve the claim against the tort-feasor in order to protect the insurer's rights against the tort-feasor.
4. **Limitations of Actions: Insurance: Motor Vehicles.** Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004) does not apply if an insured timely files a claim against an uninsured or underinsured motorist, because the statute of limitations on the insured's claim against the uninsured or underinsured motorist never expired.
5. **Time: Words and Phrases.** The word "expire," as a legal term, is generally understood to refer to a natural conclusion brought about by the passage of time, not a premature termination effected by some other cause.
6. **Limitations of Actions: Insurance: Motor Vehicles.** Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004) does not apply when an insured has settled his or her claim against an uninsured or underinsured motorist before the statute of limitations applicable to that claim would have expired.
7. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

Clarence E. Mock III and Denise E. Frost, of Johnson & Mock, for appellant.

Ralph A. Froehlich, Jay L. Welch, and Adam R. White, Senior Certified Law Student, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

The coverage required by Nebraska's Uninsured and Underinsured Motorist Insurance Coverage Act[1] does not apply to "[b]odily injury, sickness, disease, or death of the insured with respect to which the applicable statute of limitations has expired on the insured's claim against the uninsured or underinsured motorist."[2] The question presented in this case is whether a statute of limitations can be said to "expire" if the insured settles his or her claim against the alleged tort-feasor within the statutory limitations period, but does not file a complaint against the tort-feasor within the applicable statute of limitations.

## BACKGROUND

Connie Reimers-Hild was a graduate student at the University of Nebraska (University), and employed by the University as a graduate research assistant. She was a passenger in a University vehicle when she was injured in a collision with Michael Johns on June 8, 1999. Reimers-Hild's injuries arose out of and in the course of her employment,[3] and the State of Nebraska paid workers' compensation benefits for Reimers-Hild. The State is self-insured pursuant to the Nebraska Workers' Compensation Act,[4] and Sedgwick Claims Management Services, Inc. (Sedgwick), is the State's third-party claims administrator for workers' compensation claims.

The State had obtained an "All Lines Aggregate Insurance Policy," issued by Northland Insurance Company (Northland), that was in effect at the time of the accident. The Northland policy provided uninsured and underinsured motorist coverage in the amount of $50,000 for each person, but the policy also contained a self-insured retention of $300,000 for each loss under that section of the policy. As a result, the State was solely responsible for, and Northland had no obligation under the policy to pay, any claim made against the uninsured and underinsured motorist coverage of the policy. Sedgwick was

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[1] Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2004).

[2] § 44-6413(1)(e).

[3] See Neb. Rev. Stat. § 48-101 et seq. (Reissue 2004 & Cum. Supp. 2006).

[4] *Id.*

also the third-party claims administrator for claims made on the Northland policy.

Guide One Insurance Company (Guide One) was Johns' motor vehicle liability insurer. Guide One settled Reimers-Hild's claim against Johns, for the policy limit of $25,000, before June 8, 2003, when the 4-year statute of limitations would have expired on that claim.[5] As part of the settlement, Reimers-Hild executed a "Release of All Claims" in which she accepted the $25,000 as consideration for "the final release and discharge" of her claim against Johns. Reimers-Hild never filed suit against Johns. The State, through Sedgwick, was notified of and expressly consented to the settlement, and Guide One paid $12,271.62 to Sedgwick to satisfy the State's workers' compensation lien.

After settling her claim with Johns, Reimers-Hild demanded payment from the State, through Sedgwick, under the State's underinsured motorist coverage. Sedgwick denied the claim on November 3, 2003. Reimers-Hild did not file a claim with the State Claims Board, or any other State agency. Instead, on December 12, she filed a complaint in the district court against the State and the University. An amended complaint, filed July 15, 2004, added Northland as a defendant. The defendants' answer alleged, as an affirmative defense, that Reimers-Hild's claim for underinsured motorist benefits was barred because the underlying tort claim had "expired" within the meaning of § 44-6413(1)(e).

The defendants moved for a separate trial on whether Reimers-Hild's claim was barred by the statute of limitations,[6] which motion the district court granted. Pursuant to the parties' pretrial memoranda, the court's pretrial order specified that the sole issue at trial was to be whether Reimers-Hild's claim for underinsured motorist coverage was timely filed. A trial was had on a stipulated record. The court determined that the case "is governed by Section 44-6413(1)(e)" and that "[b]ecause Reimers-Hild failed to commence an action against Johns within four years, her action here is barred." The court entered judgment against Reimers-Hild, and she appeals.

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[5] See Neb. Rev. Stat. § 25-207 (Reissue 1995).

[6] See Neb. Rev. Stat. § 25-221 (Cum. Supp. 2006).

## ASSIGNMENT OF ERROR

Reimers-Hild assigns, consolidated and restated, that the district court erred in finding that her claim was barred by § 44-6413(1)(e).

## STANDARD OF REVIEW

[1] The meaning of a statute is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[7]

## ANALYSIS

[2,3] Section 44-6413(1)(e) bars as untimely an insured's claim for uninsured or underinsured motorist benefits when the statute of limitations on the underlying claim against the uninsured or underinsured motorist has "expired."[8] The purpose underlying § 44-6413(1)(e) is the protection of the insurer when it may have to pay uninsured or underinsured motorist benefits.[9] The statute makes it the responsibility of the insured to preserve the claim against the tort-feasor in order to protect the insurer's rights against the tort-feasor.[10]

But the insured can prevent the statute of limitations from "expiring" against the underlying tort-feasor by filing a timely complaint against the tort-feasor. In *Schrader v. Farmers Mut. Ins. Co.*,[11] an insured who had been injured in an automobile accident brought suit against the tort-feasor within the 4-year statute of limitations applicable to that claim, and then settled the claim. The insured sought underinsured motorist benefits from his insurer, and when they were unable to reach an agreement, the insured filed a complaint against the insurer in the district court.

[4] The insurer in *Schrader* raised a statute of limitations defense pursuant to § 44-6413(1)(e), because the insured's

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[7] *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

[8] *Schrader v. Farmers Mut. Ins. Co.*, 259 Neb. 87, 608 N.W.2d 194 (2000).

[9] *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005).

[10] See *id.*

[11] *Schrader, supra* note 8.

complaint against the insurer had not been filed within 4 years of the accident. The district court agreed and entered judgment against the insured. We reversed the judgment, explaining that § 44-6413(1)(e) "does not apply if an insured timely files a claim against an uninsured or underinsured motorist because the statute of limitations on the insured's claim against the uninsured or underinsured motorist never expired" within the meaning of § 44-6413(1)(e).[12]

The district court in this case reasoned that our decision in *Schrader* did not apply to Reimers-Hild, because she had not filed a complaint against the alleged tort-feasor. But we believe this to be a distinction without a difference. Reimers-Hild's settlement with Johns extinguished her claim against him, and the statute of limitations applicable to that claim never "expired."

We base that conclusion on the purpose of § 44-6413(1)(e), the plain meaning of the statute, and our case law explaining the statute's function. As previously noted, the purpose of § 44-6413(1)(e) is to protect the insurer's right to pursue a claim against the tort-feasor by making it the insured's responsibility to preserve the claim. More specifically, the statute operates to disallow a claim for uninsured or underinsured motorist coverage where the insured has allowed the underlying tort claim to become barred by not settling *or* bringing suit within the period of limitations.[13] Such a provision is unnecessary when the underlying tort claim has been settled, whether or not the insured files suit against the tort-feasor before settling. Whether the insurer's interests have been adequately preserved by the settlement is a subject addressed by other provisions of the Uninsured and Underinsured Motorist Insurance Coverage Act.[14]

[5] That understanding of § 44-6413 is reflected in the Legislature's use of the word "expired" to describe the statute of limitations for a claim that is time barred. The word "expire," as a legal term, is generally understood to refer to a

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[12] See *id.* at 92, 608 N.W.2d at 198.

[13] Cf. *Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775 (Iowa 2000).

[14] See, e.g., §§ 44-6412 and 44-6413(1)(a).

natural conclusion brought about by the passage of time, not a premature termination effected by some other cause.[15] This is consistent with our decision in *Schrader*, in which the statute of limitations on the underlying tort claim did not "expire," because it was prematurely terminated by suit and settlement. The settlement in this case, although not preceded by a lawsuit, also prevented the statute of limitations on the underlying tort claim from expiring due to passage of time, because the settlement (with the express consent of the State) extinguished the claim against Johns prior to the running of the statute of limitations.

[6] It would be a needless formality, and a waste of judicial resources, to require an insured to file a complaint against an uninsured or underinsured motorist where a settlement agreement has already been reached, and § 44-6413(1)(e) does not require such an action.[16] Instead, we hold that § 44-6413(1)(e) does not apply when an insured has settled his or her claim against an uninsured or underinsured motorist before the statute of limitations applicable to that claim would have expired. The district court erred in concluding otherwise.

[7] We note, before concluding, what is not at issue in this appeal. The record, particularly the pleadings and pretrial order, establishes that the only issue presented to the district court and decided in this proceeding was whether § 44-6413(1)(e) barred Reimers-Hild's claim against the defendants. And it is well established that an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[17]

The defendants, however, have raised two issues in their appellate brief that they did not raise in the trial court. First,

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[15] See, e.g., *In re Morgan*, 181 B.R. 579 (N.D. Ala. 1994); *Mackey v. Bristol West Ins. Services*, 105 Cal. App. 4th 1247, 130 Cal. Rptr. 2d 536 (2003); *Munford Union Bank v. American Ambassador*, 15 S.W.3d 448 (Tenn. App. 1999); *Waynesville Security Bank v. Stuyvesant Ins. Co.*, 499 S.W.2d 218 (Mo. App. 1973).

[16] Cf. *Jones v. Sanger*, 204 W. Va. 333, 512 S.E.2d 590 (1998).

[17] *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007).

the defendants argue that Reimers-Hild's action is against the State and is barred by sovereign immunity. We recognize that sovereign immunity implicates a jurisdictional issue[18] that may be raised at any time by any party.[19] But the record before us was created by stipulation, and the parties at the time of that stipulation apparently did not contemplate the argument the defendants have asserted on appeal. We do not know what arguments might have been made below, or what evidence might have been adduced, had the State raised a sovereign immunity defense in the district court. For that reason, we do not consider the defendants' sovereign immunity argument.

The defendants also claim that the form of notice Reimers-Hild gave Sedgwick, of the proposed settlement with Johns, was insufficient. Again, this was not raised below, and we do not consider it on appeal. Nor do we consider what statute of limitations would apply to Reimers-Hild's claim for underinsured motorist benefits, or whether there are other statutory barriers to that claim. The sole question argued below and properly before us now is whether § 44-6413(1)(e) operated to bar the claim, and we have answered that question.

## CONCLUSION

Because Reimers-Hild settled her claim against Johns, the statute of limitations on that claim did not expire, and § 44-6413(1)(e) does not apply to her claim for underinsured motorist benefits. The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

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[18] See *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002).

[19] See *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

# STATE OF NEBRASKA, APPELLEE, V. TIMOTHY E. AGEE, APPELLANT.

741 N.W.2d 161

Filed November 9, 2007. No. S-06-594.

1. **Search and Seizure: Appeal and Error.** The denial of a motion for return of seized property is reviewed for an abuse of discretion.
2. **Criminal Law: Search and Seizure: Property.** Property seized in enforcing a criminal law is said to be "in custodia legis," or in the custody of the court.
3. **Police Officers and Sheriffs: Search and Seizure: Property.** Property seized and held as evidence is to be safely kept by the officer seizing it unless otherwise directed by the court, and the officer is to exercise reasonable care and diligence for the safekeeping of the property.
4. **Trial: Search and Seizure: Evidence.** Property seized and held as evidence shall be kept so long as necessary for the purpose of being produced as evidence at trial.
5. **Courts: Jurisdiction: Search and Seizure: Property.** The court in which a criminal charge was filed has exclusive jurisdiction to determine the rights to seized property, and the property's disposition.
6. **Search and Seizure: Property.** The proper procedure to obtain the return of seized property is to apply to the court for its return.
7. ____: ____. Upon the termination of criminal proceedings, seized property, other than contraband, should be returned to the rightful owner unless the government has a continuing interest in the property.
8. ____: ____. While the government is permitted to seize evidence for use in investigation and trial, such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture.
9. ____: ____. A motion for the return of seized property is properly denied only if the claimant is not entitled to lawful possession of the property, the property is contraband or subject to forfeiture, or the government has some other continuing interest in the property.
10. **Search and Seizure: Property: Presumptions: Proof.** When criminal proceedings have terminated, the person from whom property was seized is presumed to have a right to its return, and the burden is on the government to show that it has a legitimate reason to retain the property.
11. **Property: Presumptions: Proof.** A presumption of ownership is created by exclusive possession of personal property, and evidence must be offered to overcome that presumption.
12. **Search and Seizure: Property: Proof.** One in possession of property has the right to keep it against all but those with better title, and the mere fact of seizure does not require that "entitlement be established anew."
13. ____: ____: ____. Seizure of property from someone is prima facie evidence of that person's right to possession of the property, and unless another party presents evidence of superior title, the person from whom the property was taken need not present additional evidence of ownership.

14. **Trial: Attorneys at Law: Evidence.** An attorney's assertions at trial are not to be treated as evidence.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded for further proceedings.

Timothy E. Agee, pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Timothy E. Agee appeals from the denial of his motion for the return of property seized from his residence by police, who were investigating Agee's reported involvement in several thefts. The theft charge was dismissed, but the court refused to order the return of property the State argued had been stolen. This appeal requires us to consider the circumstances under which the State can refuse to return seized property, and the burden of proving such circumstances. In this case, because the State did not present evidence establishing a basis for refusing to return the property, we reverse the order of the district court.

## BACKGROUND

Agee was charged with theft by deception[1] in an information filed November 23, 2004. The information generally charged Agee with using deception to obtain property, valued at over $1,500,[2] from a department store.

For context, it is helpful to note that on the same date, Agee was charged in a separate information with unlawful possession with intent to deliver a controlled substance; specifically,

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[1] See Neb. Rev. Stat. § 28-512 (Reissue 1995).

[2] See Neb. Rev. Stat. § 28-518(1) (Reissue 1995).

marijuana.[3] A habitual criminal charge was later added. The marijuana had been discovered during the execution of a search warrant at Agee's residence on October 8, 2004.[4] The search warrant was supported by information suggesting that Agee was involved in an ongoing scheme to use checks and fraudulent driver's licenses to make purchases at local department stores.[5]

Following a jury trial, on May 24, 2005, the district court convicted Agee on the marijuana charge and found him to be a habitual criminal. On July 25, the theft charge was dismissed without prejudice on the State's motion. On August 31, the court sentenced Agee to 10 years' imprisonment on the drug and habitual criminal convictions.

On April 19, 2006, Agee filed a pro se motion in the district court for an order directing the county sheriff to return property that had been seized from Agee's home, during the October 8, 2004, execution of the search warrant, as evidence of theft. Specifically, Agee asked for the return of 3 watches, 1 diamond bracelet, 2 cellular telephones, 10 assorted articles of clothing, an unspecified number of photographs, and Agee's wallet and Social Security card. Agee specifically alleged that the items were not illegal per se and that they had value to him.

A hearing was held at which Agee, acting pro se, appeared telephonically. In response to Agee's motion, counsel for the State represented that one of the watches, the bracelet, and the cellular telephones were stolen property. The State said it had no record of another two watches. The State explained that the clothing had been stolen from the department store and had already been returned to the store. Agee indicated he had receipts showing how he had lawfully purchased the clothing and bracelet.

No evidence was adduced at the hearing by either party. Nonetheless, the court explained that "[t]hey tell me [the watch] is stolen, [the bracelet] is stolen, there isn't [another]

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[3] See *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 548 N.W.2d 733 (1996) (taking judicial notice of proceedings in related case).

[4] See *State v. Agee*, No. A-05-1153, 2006 WL 2129117 (Neb. App. Aug. 1, 2006) (not designated for permanent publication).

[5] See *id.*

watch, and the clothes are stolen and they have already been given back to the owner, that being [the department store]." The court overruled Agee's motion except as to his Social Security card and photographs, which were ordered returned. Agee appealed.

## ASSIGNMENT OF ERROR

Agee argues that the district court committed reversible error when it overruled his motion for the return of his personal property.

## STANDARD OF REVIEW

[1] The denial of a motion for return of seized property is reviewed for an abuse of discretion.[6]

## ANALYSIS

[2-6] Property seized in enforcing a criminal law is said to be "in custodia legis," or in the custody of the court.[7] Property seized and held as evidence is to be safely kept by the officer seizing it unless otherwise directed by the court, and the officer is to exercise reasonable care and diligence for the safekeeping of the property.[8] The property shall be kept so long as necessary for the purpose of being produced as evidence at trial.[9] The court in which a criminal charge was filed has exclusive jurisdiction to determine the rights to seized property, and the property's disposition.[10] The proper procedure to obtain the return of seized property is to apply to the court for its return.[11]

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[6] See, *State v. Allen*, 159 Neb. 314, 66 N.W.2d 830 (1954); *State v. Maestas*, 11 Neb. App. 262, 647 N.W.2d 122 (2002); Neb. Rev. Stat. §§ 29-818 to 29-820 (Reissue 1995 & Cum. Supp. 2006). See, also, *DeLoge v. State*, 156 P.3d 1004 (Wyo. 2007).

[7] See, *Allen, supra* note 6; *Maestas, supra* note 6.

[8] *Nash v. City of North Platte*, 205 Neb. 480, 288 N.W.2d 51 (1980). See, also, § 29-818.

[9] § 29-818.

[10] See, *State v. Holmes*, 221 Neb. 629, 379 N.W.2d 765 (1986); *Allen, supra* note 6; *State v. Cox*, 3 Neb. App. 80, 523 N.W.2d 52 (1994), *affirmed* 247 Neb. 729, 529 N.W.2d 795 (1995); §§ 29-818 to 29-820.

[11] See, *Allen, supra* note 6; *Maestas, supra* note 6.

We digress, at this point, to respond to the State's contention that we lack jurisdiction over this appeal. Although not disputing the district court's jurisdiction to decide Agee's motion, the State suggests that the court's denial of the motion is not a final, appealable order. The Nebraska Court of Appeals has held that the denial of a motion for the return of seized property is appealable as an order affecting a substantial right made upon a summary application in an action after judgment.[12] The State disagrees, contending that a criminal proceeding is not an "action."[13] An order denying the return of seized property after a criminal proceeding has concluded is perhaps better characterized as an order made in a special proceeding than an order made in an action after judgment.[14] But regardless, we agree with the Court of Appeals' ultimate conclusion that an order of this kind, made after the conclusion of criminal proceedings, is final and reviewable on appeal, so we proceed to the merits of Agee's argument.

[7-9] Although this court has not discussed the issue, the general rule is well established that upon the termination of criminal proceedings, seized property, other than contraband, should be returned to the rightful owner unless the government has a continuing interest in the property.[15] " '[I]t is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government

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[12] See, *Maestas, supra* note 6; Neb. Rev. Stat. § 25-1902 (Reissue 1995).

[13] See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991) ("action" means civil action), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

[14] See, § 25-1902; *In re Interest of R.G., supra* note 13 (special proceeding includes every special statutory remedy not in itself action).

[15] See, e.g., *U.S. v. David*, 131 F.3d 55 (2d Cir. 1997); *Sovereign News Co. v. United States*, 690 F.2d 569 (6th Cir. 1982); *United States v. Wright*, 610 F.2d 930 (D.C. Cir. 1979); *DeLoge, supra* note 6; *Newman v. Stuart*, 597 So. 2d 609 (Miss. 1992); *DeBellis v. New York City Property Clk.*, 79 N.Y.2d 49, 588 N.E.2d 55, 580 N.Y.S.2d 157 (1992); *State v. Ell*, 338 N.W.2d 845 (S.D. 1983); *Banks v Detroit Police Dep't*, 183 Mich. App. 175, 454 N.W.2d 198 (1990).

claim lies, be returned promptly to its rightful owner.'"[16] While the government is permitted to seize evidence for use in investigation and trial, such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture.[17] It would be antithetical to the notions of fairness and justice under which we operate to convert the government's right to temporary possession to a right to hold such property indefinitely.[18] Thus, a motion for the return of property is properly denied only if the claimant is not entitled to lawful possession of the property, the property is contraband or subject to forfeiture, or the government has some other continuing interest in the property.[19]

[10-13] The State's primary contention on appeal is that Agee presented no evidence supporting his claim to the property. But this argument misapprehends the burden of proof in such a proceeding. When criminal proceedings have terminated, the person from whom property was seized is presumed to have a right to its return, and the burden is on the government to show that it has a legitimate reason to retain the property.[20] It is long established that a presumption of ownership is created by exclusive possession of personal property and that evidence must be offered to overcome that presumption.[21] One in possession

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[16] *Wright, supra* note 15, 610 F.2d at 934. Accord *People v. Strock*, 931 P.2d 538 (Colo. App. 1996).

[17] See *U.S. v. Chambers*, 192 F.3d 374 (3d Cir. 1999).

[18] See *Government of Virgin Islands v. Edwards*, 903 F.2d 267 (3d Cir. 1990).

[19] See, *David, supra* note 15; *U.S. v. Fitzen*, 80 F.3d 387 (9th Cir. 1996); *DeLoge, supra* note 6; *State v. Alaway*, 64 Wash. App. 796, 828 P.2d 591 (1992).

[20] See, *Chambers, supra* note 17; *U.S. v. Dean*, 100 F.3d 19 (5th Cir. 1996); *United States v. Martinson*, 809 F.2d 1364 (9th Cir. 1987); *DeLoge, supra* note 6; *Com. v. Fontanez*, 559 Pa. 92, 739 A.2d 152 (1999); *DeBellis, supra* note 15; *State v. Shore*, 522 A.2d 1215 (R.I. 1987); *Strock, supra* note 16; *Banks, supra* note 15; *State v. Card*, 48 Wash. App. 781, 741 P.2d 65 (1987).

[21] *In re Estate of Severns*, 217 Neb. 803, 352 N.W.2d 865 (1984). See *Edwards, supra* note 18.

of property has the right to keep it against all but those with better title,[22] and the "mere fact of seizure" does not require that "entitlement be established anew."[23] Seizure of property from someone is prima facie evidence of that person's right to possession of the property, and unless another party presents evidence of superior title, the person from whom the property was taken need not present additional evidence of ownership.[24]

In this case, the State argued to the district court that much of the property was stolen. We agree that stolen property should be returned to its rightful owner.[25] In most cases, the theft of the property will be substantiated by the findings underlying a criminal conviction.[26] But here, the charges had been dismissed. The State had seized property from Agee, and he was presumably entitled to its return once the proceedings were concluded, but the State did not overcome that presumption by presenting evidence of a cognizable claim or right of possession adverse to Agee's.[27] Nor was the property contraband per se, which may not be returned because its possession is inherently unlawful.[28] Nor did the State present evidence of any of the other grounds that have been used to justify the government's retention of property, such as an ongoing investigation,[29] a tax lien,[30] an imposed fine,[31] or an order of restitution.[32]

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[22] *Edwards, supra* note 18.

[23] *Wright, supra* note 15, 610 F.2d at 939. Accord *Edwards, supra* note 18.

[24] See, *Fitzen, supra* note 19; *Edwards, supra* note 18; *Wright, supra* note 15; *Fontanez, supra* note 20; *Shore, supra* note 20; *Ell, supra* note 15; *Strock, supra* note 16; *Banks, supra* note 15.

[25] See § 29-820(1)(a).

[26] See *Dean, supra* note 20.

[27] See, *id.*; *Fitzen, supra* note 19; *Edwards, supra* note 18; *Banks, supra* note 15; *Card, supra* note 20.

[28] See *Boggs v. Rubin*, 161 F.3d 37 (D.C. Cir. 1998).

[29] See, e.g., *DeLoge, supra* note 6.

[30] See, e.g., *Fitzen, supra* note 19; *United States v. Francis*, 646 F.2d 251 (6th Cir. 1981).

[31] See, e.g., *David, supra* note 15.

[32] See, e.g., *U.S. v. Mills*, 991 F.2d 609 (9th Cir. 1993).

[14] The district court erred in relying on the representations made by the State, instead of demanding evidence relevant to the State's allegations. The State must do more than assert, without evidentiary support, that the property was stolen, or is not in the State's possession.[33] An attorney's assertions at trial are not to be treated as evidence.[34] Instead of taking the State's assertions at face value, the court was obliged to take evidence to support its factual findings respecting its decision to grant or deny Agee's motion.[35] The court abused its discretion by substantially denying Agee's motion without requiring the State to submit evidence supporting its continued retention or disposition of the property.[36]

We recognize that there was some dispute, in the district court, about whether certain items claimed by Agee were actually in the possession of the State. But police executing a search warrant are required to keep an inventory that should make it a straightforward matter for the State to establish what property was seized from Agee and how that property was disposed of.[37] And the State's seizure of most of the items was not disputed. We also note that the State admitted to having already returned some items to the store from which they had allegedly been stolen, apparently without direction from the court. This was contrary to the court's exclusive jurisdiction over such property.[38] It has been consistently held, however, that the government's disposition or destruction of property does not moot a motion

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[33] See, *Chambers, supra* note 17; *Mora v. U.S.*, 955 F.2d 156 (2d Cir. 1992); *DeLoge, supra* note 6; *Scott v. State*, 922 So. 2d 1024 (Fla. App. 2006).

[34] *Cochran v. Bill's Trucking*, 10 Neb. App. 48, 624 N.W.2d 338 (2001); *City of Lincoln v. MJM, Inc.*, 9 Neb. App. 715, 618 N.W.2d 710 (2000).

[35] See, *Chambers, supra* note 17; *U.S. v. Burton*, 167 F.3d 410 (8th Cir. 1999); *Rufu v. U.S.*, 20 F.3d 63 (2d Cir. 1994); *Mora, supra* note 33; *DeLoge, supra* note 6; *Scott, supra* note 33; *Dailey v. State*, 640 So. 2d 1059 (Ala. App. 1993); *Card, supra* note 20.

[36] See *DeLoge, supra* note 6.

[37] See, Neb. Rev. Stat. § 29-815 (Reissue 1995); *Rufu, supra* note 35. See, also, *State ex rel. Wagner v. Amwest Surety Ins. Co., ante* p. 121, 738 N.W.2d 813 (2007).

[38] See, *Holmes, supra* note 10; *Allen, supra* note 6; *Cox, supra* note 10; §§ 29-818 to 29-820.

for return of the property, although we have no need in this appeal to discuss the scope of available relief.[39]

## CONCLUSION

Once the criminal proceedings against Agee were concluded, Agee was presumptively entitled to the return of property seized from him unless the State presented evidence justifying its refusal to do so. The district court erred in substantially denying Agee's motion without requiring the State to submit such evidence. The district court's order denying Agee's motion is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HEAVICAN, C.J., not participating.

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[39] See, e.g., *Chambers, supra* note 17; *U.S. v. Kanasco, Ltd.*, 123 F.3d 209 (4th Cir. 1997); *Thompson v. Covington*, 47 F.3d 974 (8th Cir. 1995); *Rufu, supra* note 35; *Martinson, supra* note 20; *Francis, supra* note 30. Compare, e.g., *Okoro v. Callaghan*, 324 F.3d 488 (7th Cir. 2003); *U.S. v. Hall*, 269 F.3d 940 (8th Cir. 2001); *U.S. v. Potes Ramirez*, 260 F.3d 1310 (11th Cir. 2001); *U.S. v. Bein*, 214 F.3d 408 (3d Cir. 2000); *Peña v. U.S.*, 157 F.3d 984 (5th Cir. 1998) (discussing split over jurisdiction to award money damages).

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## DAVID HOGELIN AND INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL NO. 1575, APPELLEES, V. CITY OF COLUMBUS, NEBRASKA, A POLITICAL SUBDIVISION, AND DEAN HEFTI, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE CITY OF COLUMBUS FIRE DEPARTMENT, APPELLANTS.

741 N.W.2d 617

Filed November 16, 2007. No. S-06-641.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.

3. **Labor and Labor Relations: Waiver.** A waiver of a statutory right in a collective bargaining agreement must be established by clear and express contractual language.
4. **Labor and Labor Relations: Waiver: Proof.** An employer bears the burden of establishing that a clear and unmistakable waiver of a statutory right in a collective bargaining agreement has occurred.
5. **Labor and Labor Relations: Employment Contracts: Waiver.** A clear and unmistakable waiver of a statutory right may be found in the express language of a collective bargaining agreement, or it may be implied from the structure of an agreement and the parties' course of conduct.
6. ____: ____: ____. A waiver of statutory rights in a collective bargaining agreement must be knowingly made and must specifically address the subject upon which the waiver is claimed.
7. ____: ____: ____. No waiver of a statutory right will be implied in a collective bargaining agreement unless it is clear that the parties were aware of their rights and made the conscious choice to waive them.
8. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right.
9. **Injunction.** An injunction is an extraordinary remedy that ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
10. **Equity: Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
11. **Injunction: Damages: Words and Phrases.** An injury is irreparable when it is of such a character or nature that the party injured cannot be adequately compensated in damages, or when the damages which may result cannot be measured by any certain pecuniary standard.
12. ____: ____: ____. Irreparable injury, as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great.
13. **Injunction: Public Officers and Employees.** Unlawful acts by public officers may, in a proper case, be restrained.
14. **Actions: Injunction.** When an action is brought to enforce a statute or make effective a declared policy of the Legislature, the standards of public interest and not the requirements of private litigation measure the propriety and need for injunctive relief.
15. **Injunction.** A remedy at law is not adequate if the situation requires and the law permits preventative relief as preventing the repetition and continuance of wrongful acts.
16. ____. Injunction may be withheld when it is likely to inflict greater injury than the grievance complained of.
17. **Equity.** If the protection of a legal right would do a plaintiff comparatively little good and would produce great public or private hardship, equity will remit the plaintiff to his or her legal rights and remedies.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Mark A. Fahleson and David J.A. Bargen, of Rembolt Ludtke, L.L.P., for appellants.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

This case involves a dispute between the City of Columbus (the City) and its firefighters about whether training sessions mandated by the City would have resulted in a violation of state law regulating the hours firefighters can be required to work.[1] The district court concluded that the scheduled sessions were unlawful and enjoined the City from requiring them. The issues presented in this appeal are whether the scheduled training sessions would have violated the law and whether the firefighters were entitled to injunctive relief.

## BACKGROUND

At the time of trial, the City maintained a force of 12 full-time career firefighters and 72 volunteers. A shift for paid firefighters was 24 hours, and the fire department had three shifts that rotated on a 3-day cycle to provide full-time, 24-hour coverage. The City's description of the job of "Firefighter/Emergency Medical Technician" stated, in relevant part, that the job "require[d] knowledge and skill acquired only through specialized training" and that firefighters would be required to "successfully complete all required in-service training requirements."

Dean Hefti, the Columbus fire chief, explained that for their safety, emergency management responders need to be trained in awareness and operations with respect to hazardous materials. In addition, the City had received a homeland security

[1] See Neb. Rev. Stat. § 35-302 (Reissue 2004).

grant for a hazardous materials response team. Hefti testified that the grant money was at risk unless the City assembled such a team. To that end, Hefti arranged mandatory hazardous materials training sessions. But Hefti said that while the grant "was there," the reason he made the training mandatory was "the safety of the firefighters and the responding personnel to industrial accidents, car accidents, et cetera," as well as public safety. Firefighters had attended off-shift training sessions before, but had done so at their own individual request, subject to Hefti's approval.

The training sessions at issue in this case were scheduled and conducted by the State Fire Marshal Training Division, and held at the Columbus Fire Department. Hefti explained that the State Fire Marshal was used because it met "NFPA code" and was available at no cost. The training sessions were scheduled for 7 p.m. on Thursday evenings: May 5, 12, and 26, 2005; June 23 and 30; and July 7, 14, 21, and 28. Hefti said that the State Fire Marshal did not agree to alternative schedules he had suggested.

Letters to Hefti from the State Fire Marshal Training Division explained that "[t]here must be at least **14** students in attendance at the course or it may be subject to cancellation. Please make sure your members attend these courses, since proper training is vital to every emergency response organization." The letters also encouraged Hefti to invite others, such as law enforcement and emergency services personnel, and included a form letter for that purpose.

Hefti sent a memorandum to all career personnel explaining the mandatory training schedule. David Hogelin, president of the firefighters' union, the International Association of Firefighters Local No. 1575 (the Union), objected on the firefighters' behalf. Hogelin's letter to Hefti explained that "[n]ine weeks of every Thursday night is a strain on the families of the fighters, who already spend every third day at the station." Hogelin suggested that the training could be accomplished more quickly and on duty time.

Hogelin's letter specifically cited state law as barring the mandatory training sessions. Section 35-302 provides that

firefighters employed by cities having paid fire departments "shall not be required to remain on duty for periods of time which will aggregate in each month more than an average of sixty hours per week." Hogelin explained that including the additional training hours, Columbus firefighters would be required to work an average of 61.76 hours a week.

In response to Hogelin's letter, Hefti and the Columbus city administrator provided Hogelin with a memorandum concluding that the required sessions were legal under the collective bargaining agreement (CBA) between the Union and the City and that the sessions would remain mandatory. Section 35-302 provides that a firefighter's single-duty shift shall be 24 consecutive hours, followed by an off-duty period as necessary to comply with the statute, "unless by voluntary agreement between the city and the firefighter, any firefighter may be permitted to work an additional period of consecutive time," and may return to work after less than 24 hours off duty. The City's position was that the CBA was such a "voluntary agreement," because it provided in relevant part that

> [a]ll management rights, functions, responsibilities, and authority not specifically limited by the express terms of this Agreement [or] State Statute . . . are retained by the [City] and remain exclusively within the rights of the [City]. These rights, powers, and authority include, but are not limited to . . . the scheduling of operations and the time to be worked . . . .

The CBA also provided that the normal work schedule would be "24 hours on, followed by 48 hours off, with the workday starting at 8 a.m." but that "[s]hould it be necessary in the judgment of the [City] to establish different work schedules or starting time, notice of such changes shall be given to the Union as far in advance as is reasonably possible." Hogelin averred, however, that as Union president, he had never discussed waiving any rights of Union members under § 35-302.

On May 10, 2005, Hogelin and the Union (hereinafter collectively the Union) filed a complaint in the district court against Hefti and the City (hereinafter collectively the City), seeking declaratory and injunctive relief, and a motion for a temporary

injunction. An evidentiary hearing on the motion was held on May 27 on the underlying legal issues and the firefighters' damages.

Hogelin averred that pursuant to a court-ordered visitation schedule, he was entitled to visitation with his son on every Thursday evening he was not scheduled to work and that the mandatory training would have the effect of depriving him of visitation. Ryan Loewnstein averred that he received a written reprimand after he failed to attend a May 5, 2005, training session, even though Hefti had already approved his request for leave to attend a wedding in North Carolina. Several other firefighters had been reprimanded for failing to attend the training sessions. Hefti also conceded that although fewer than 14 students attended the May 12 session, it had not been canceled.

The district court concluded that the mandatory training schedule would invade the firefighters' off-duty hours, protected by § 35-302. The court further concluded that the collective bargaining agreement did not override § 35-302. The court found that the firefighters would suffer irreparable harm, as Hefti had already reprimanded firefighters who had failed to attend training in their off-duty hours, and that "the threat of additional disciplinary measures for future nonattendance is real and genuine, not imaginary." The court entered a temporary injunction ordering Hefti and the City not to impose the mandatory hazardous materials training. On substantially the same evidence, on May 10, 2006, the court entered a permanent injunction to the same effect.

## ASSIGNMENTS OF ERROR

The City assigns that the court erred in granting relief to the Union because (1) the requirement that firefighters attend hazardous materials training does not violate § 35-302, (2) training is not "harm" entitling the Union to injunctive relief, and (3) even if the training is "harm," it is compensable by money damages.

## STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions

de novo on the record and reaches a conclusion independent of the findings of the trial court.[2]

[2] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.[3]

## ANALYSIS

### VIOLATION OF § 35-302

We note, initially, that the City's brief does not take issue with the court's conclusion that the hazardous materials training requirement, if implemented, would place the firefighters' working hours in violation of the 60-hour-per-week limitation imposed by § 35-302. Instead, the City's argument that the requirement would not violate § 35-302 is premised entirely on the CBA, so our analysis of the City's first assignment of error is also limited to the effect of the CBA. Section 35-302 provides in full:

> Firefighters employed in the fire departments of cities having paid fire departments shall not be required to remain on duty for periods of time which will aggregate in each month more than an average of sixty hours per week. Each single-duty shift shall consist of twenty-four consecutive hours and shall be followed by an off-duty period as necessary to assure compliance with the requirements of this section unless by voluntary agreement between the city and the firefighter, any firefighter may be permitted to work an additional period of consecutive time and may return to work after less than a twenty-four-hour off-duty period. Any firefighter may be assigned to work less than a twenty-four-hour shift, but in such event the firefighter shall not work in excess of forty hours per week. No firefighter shall be required to perform any work or service

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[2] *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006), *cert. denied* 547 U.S. 1130, 126 S. Ct. 2058, 164 L. Ed. 2d 784.

[3] *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

> as such firefighter during any period in which he or she is off duty except in cases of extraordinary conflagration or emergencies or job-related court appearances.

The City claims that the provisions of the CBA set forth above effected a "voluntary agreement," within the meaning of § 35-302, to alter the firefighters' work schedules by conferring scheduling authority on the City.

We note that there is substantial authority for the proposition that some statutory rights, particularly those intended to serve an important public policy or guarantee the personal rights of individual workers, cannot be waived through collective bargaining.[4] For instance, an individual's statutory protection against discrimination cannot generally be waived by his or her collective bargaining agent.[5] "While a union undeniably has the power to waive statutory rights related to collective activity . . . certain other statutory rights stand on a different footing. . . . Rights of this kind, which are of a personal, and not merely economic, nature are beyond a labor union's ability to bargain away."[6] But for purposes of our analysis in this case, we assume, without deciding, that the rights protected by § 35-302 could be waived through collective bargaining. We need not answer that question, because we conclude that the CBA at issue in this case did not effect such a waiver.

[3] It is well settled that a waiver in a collective bargaining agreement must be established by clear and express contractual

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[4] See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). See, e.g., *Cooper v. Smithfield Terminal Ry. Co.*, 635 A.2d 952 (Me. 1993); *School Comm. of Brockton v. Massachusetts Commission Against Discrimination*, 377 Mass. 392, 386 N.E.2d 1240 (1979); *Wright v. City of Santa Clara*, 213 Cal. App. 3d 1503, 262 Cal. Rptr. 395 (1989); *City of Orlando v. Intern. Ass'n of F. F., etc.*, 384 So. 2d 941 (Fla. App. 1980). Cf. *Matter of ABC v Roberts*, 61 N.Y.2d 244, 461 N.E.2d 856, 473 N.Y.S.2d 370 (1984) (waiver of statutory rights permissible where legislative purpose not contravened).

[5] See *Alexander, supra* note 4.

[6] *School Comm. of Brockton, supra* note 4, 377 Mass. at 399, 386 N.E.2d at 1244.

language.[7] As the U.S. Supreme Court has stated, "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable."[8]

[4-7] An employer bears the burden of establishing that a clear and unmistakable waiver has occurred.[9] A clear and unmistakable waiver may be found in the express language of a collective bargaining agreement, or it may even be implied from the structure of an agreement and the parties' course of conduct.[10] But a waiver of statutory rights in a CBA must be knowingly made and must specifically address the subject upon which the waiver is claimed.[11] The contract must demonstrate that the intent of the parties was to preempt statutory rights.[12] No waiver will be implied unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them.[13]

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[7] *Central City Educ. Ass'n v. IELRB*, 149 Ill. 2d 496, 599 N.E.2d 892, 174 Ill. Dec. 808 (1992). See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002). See, e.g., *Carson v. Giant Food, Inc.*, 175 F.3d 325 (4th Cir. 1999); *N.L.R.B. v. New York Telephone Co.*, 930 F.2d 1009 (2d Cir. 1991); *Timkin Roller Bearing Company v. N. L. R. B.*, 325 F.2d 746 (6th Cir. 1963); *State ex rel. v. Local School Dist.*, 89 Ohio St. 3d 191, 729 N.E.2d 743 (2000); *Appeal of White Mts. Regional School Bd.*, 125 N.H. 790, 485 A.2d 1042 (1984); *Faust v. Ladysmith-Hawkins School Systems*, 88 Wis. 2d 525, 277 N.W.2d 303 (1979); *Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 937 P.2d 1382 (Ariz. App. 1996).

[8] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983). Accord, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998); *Hammond v. State, Dept. of Transp.*, 107 P.3d 871 (Alaska 2005); *Pasco Police Ass'n v. City of Pasco*, 132 Wash. 2d 450, 938 P.2d 827 (1997); *Dept. of Cent. Management Services v. Bd.*, 373 Ill. App. 3d 242, 869 N.E.2d 274, 311 Ill. Dec. 600 (2007).

[9] *New York Telephone Co., supra* note 7.

[10] *Id.*

[11] See *Pasco Police Ass'n, supra* note 8.

[12] See, *Local School Dist., supra* note 7; *Dept. of Cent. Management Services, supra* note 8.

[13] *New York Telephone Co., supra* note 7; *Pasco Police Ass'n, supra* note 8.

The parties' CBA in this case does not demonstrate a clear and unmistakable waiver of the firefighters' rights under § 35-302. There is no mention in the CBA of the statute or its requirements,[14] and silence in the bargaining agreement on such an issue does not meet the test.[15] The language relied upon by the City refers only in general terms to the City's responsibility for establishing duty schedules, and "[b]road, general language is not sufficient to meet the level of clarity required to effect a waiver in a CBA."[16] In fact, to the extent that statutory limitations on working conditions are mentioned in the CBA, that language supports the Union's argument, because the CBA reserves to the City all management responsibilities "*not* . . . limited by . . . State Statute." (Emphasis supplied.) And the only evidence in the record relevant to the negotiations between the parties, Hogelin's affidavit, implies that § 35-302 was not the subject of bargaining.

[8] The City contends that the authority cited above is inapplicable to this case, because § 35-302 permits firefighters to voluntarily agree to work beyond the hours permitted by the statute. The City asserts that because § 35-302 contains an "exception" for voluntary agreements, the CBA is not really a "waiver" of statutory rights that must be clear and unmistakable. But the City's argument is unavailing. The fact that rights under § 35-302 *can* be waived by voluntary agreement does not prove that they *were* waived in the absence of evidence to that effect. And contrary to the City's suggestion, a voluntary agreement as allowed by § 35-302 is a "waiver" of a statutory right. A "waiver" is "a voluntary and intentional relinquishment of a known right."[17] Section 35-302 provides firefighters with statutory rights and permits firefighters to waive those rights by voluntary agreement, but does not alter

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[14] See, *Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1 (1st Cir. 1999). Compare, e.g., *Frontier Ins. Co. v. Koppell*, 225 A.D.2d 93, 648 N.Y.S.2d 812 (1996).

[15] See *Timkin Roller Bearing Company, supra* note 7.

[16] *Carson, supra* note 7, 175 F.3d at 331.

[17] *Faust, supra* note 7, 88 Wis. 2d at 532-33, 277 N.W.2d at 306. See, also, *Crete Ed. Assn., supra* note 7; *Koppell, supra* note 14.

the well-established principle that such a waiver must be clearly and expressly established.

In short, we will not assume that the Union waived a statutory right unless that waiver is clearly established, and nothing in the CBA or the record in this case establishes a clear and unmistakable waiver of the firefighters' rights under § 35-302. The City's first assignment of error is without merit.

### Availability of Injunctive Relief

The City contends that even if the mandatory training schedule was in violation of § 35-302, injunctive relief was inappropriate. We disagree.

[9] We acknowledge that an injunction is an extraordinary remedy that ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.[18] The City argues that the firefighters had an adequate remedy at law.

[10-12] But an adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.[19] And an injury is irreparable when it is of such a character or nature that the party injured cannot be adequately compensated in damages, or when the damages which may result cannot be measured by any certain pecuniary standard.[20] Irreparable injury, as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great.[21]

[13,14] The City argues that the firefighters were not entitled to injunctive relief because "being required to attend [hazardous materials] training three hours a week for a few weeks in the summer certainly does not rise to the level of an 'irreparable

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[18] *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006).

[19] *Id.*

[20] See *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

[21] *Id.*

harm.'"[22] But that requirement violates state law, and unlawful acts by public officers may, in a proper case, be restrained.[23] When an action is brought to enforce a statute or make effective a declared policy of the Legislature, the standards of public interest and not the requirements of private litigation measure the propriety and need for injunctive relief.[24] Here, the firefighters were being required to work in excess of the hours that the Legislature has determined, as a matter of public policy, to be permissible without specific agreement. That represents an injury that the district court correctly considered in determining the relief to be afforded. We also note the City's implicit concession that the firefighters were entitled to monetary compensation for the time spent in training. Effectively, the City would be unlawfully expending public funds—also an injury subject to injunction.[25]

The City also contends that the mandatory training was not "harm" at all, because the firefighters would benefit from the training, and had requested training in the past. We disagree with the City's suggestion that an unlawful work requirement does not "harm" an individual simply because it is believed to be for the individual's own good. And in any event, the Legislature's decision to enact § 35-302 forecloses that contention.

Next, the City argues that the harm was not irreparable because it involved time at work, which is compensable in money damages. It is not entirely clear, however, what pecuniary standard the City is suggesting should be applied to compensate the firefighters for its unlawful work requirements. It appears that the City is contending that the firefighters would be made whole if they were paid the wages due for the work required of them.

But if the sole relief available to the Union is that the City simply pay the firefighters wages for the time spent training,

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[22] Brief for appellants at 24.

[23] See *Kuester v. State*, 191 Neb. 680, 217 N.W.2d 180 (1974).

[24] See *Edwards v. Boston*, 408 Mass. 643, 562 N.E.2d 834 (1990). See, also, *Tulsa Order of Police Lodge v. Tulsa*, 39 P.3d 152 (Okla. Civ. App. 2001); *Weimer v. City of Baton Rouge*, 915 So. 2d 875 (La. App. 2005).

[25] See *Farrell v. School Dist. No. 54*, 164 Neb. 853, 84 N.W.2d 126 (1957).

then § 35-302 would be effectively unenforceable. We have stated that "if an absence of irreparable harm (beyond the illegality of the expenditure itself) prevents a court from deciding if an illegal expenditure of public funds has occurred, following the law becomes irrelevant to those entrusted to uphold it."[26] Similarly, if the City was permitted to require firefighters to work whatever hours it pleased, subject only to the requirement that they be paid, then § 35-302 would cease to be relevant to those charged with obeying it.

[15] Instead, we have said that a remedy at law is not adequate if the situation requires and the law permits preventative relief as preventing the repetition and continuance of wrongful acts.[27] Whether damages are to be viewed by a court of equity as "irreparable" depends more upon the nature of the right which is injuriously affected than upon the pecuniary measure of the loss suffered.[28] And in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief.[29] We have little difficulty in concluding on the facts of this case that the City's violation of state law, expressed intent to continue violating state law, and imposition upon firefighters that resulted from that policy, justified the district court's order of injunctive relief.[30]

In arguing to the contrary, the City relies on *Davenport v. International Broth. of Teamsters*,[31] in which the D.C. Circuit concluded that members of a flight attendants' union were not entitled to an injunction against a change in their work schedules that exceeded the limitations imposed by their CBA. But *Davenport* is readily distinguishable. In *Davenport*, the flight attendants' "principal contention" was that the proposed

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[26] *Rath, supra* note 20, 267 Neb. at 281, 673 N.W.2d at 885.

[27] *Adams v. Adams*, 156 Neb. 778, 58 N.W.2d 172 (1953).

[28] *Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co.*, 128 Conn. 596, 24 A.2d 841 (1942). See *Armbruster v. Stanton-Pilger Drainage Dist.*, 169 Neb. 594, 100 N.W.2d 781 (1960).

[29] *CWA v. Treffinger*, 291 N.J. Super. 336, 677 A.2d 295 (1996).

[30] See, *Adams, supra* note 27; *Burroughs Wellcome & Co., supra* note 28.

[31] *Davenport v. International Broth. of Teamsters*, 166 F.3d 356 (D.C. Cir. 1999).

schedules "increase[d] the flight time required of flight attendants in a given duty period, while at the same time eliminating attendants' per diem pay and hotel allowances because overnight stays are no longer required on such trips."[32] The D.C. Circuit concluded that their injury could be remedied with money damages, invoking the proposition that "'temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.'"[33] In other words, the issue decided by the D.C. Circuit in *Davenport* was whether the income lost by the flight attendants was an irreparable harm. In the present case, lost income is not at issue.

[16,17] Finally, the City argues that injunction should have been denied because the benefits to the firefighters and the public from hazardous materials training outweighed any injury to the firefighters resulting from the training requirement. We acknowledge the general proposition that injunction may be withheld when it is likely to inflict greater injury than the grievance complained of.[34] "'If the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficent hand and remit the plaintiff to his legal rights and remedies.'"[35]

But the City's public policy argument is forestalled by § 35-302. It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.[36] Although the City adduced very little evidence at trial to support its public policy argument, we are not in a position to question the benefits of training firefighters about hazardous materials. But those benefits must be obtained either within the limitations imposed as a matter of public policy by the Legislature or with the voluntary agreement of

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[32] *Id.* at 367.

[33] *Id.*

[34] *Lambert, supra* note 18. See, also, *Edwards, supra* note 24.

[35] *Lambert, supra* note 18, 271 Neb. at 451, 712 N.W.2d at 276.

[36] *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

the firefighters to do otherwise. Section 35-302 contains exceptions for "extraordinary conflagration or emergencies or job-related court appearances." Perhaps job-related training should be added to that list of exceptions. But if so, that decision belongs to the Legislature.

For those reasons, we find the City's remaining assignments of error to be without merit.

## CONCLUSION

We conclude that the parties' collective bargaining agreement did not effect a waiver of the firefighters' rights under § 35-302 and that the district court did not err in enjoining the City's enforcement of its unlawful policy. The judgment of the district court is affirmed.

AFFIRMED.

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RICK EASTLICK, APPELLANT, V. LUEDER CONSTRUCTION COMPANY, A DISSOLVED NEBRASKA CORPORATION, ET AL., APPELLEES.
741 N.W.2d 628

Filed November 16, 2007. No. S-06-721.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
5. **Negligence: Liability: Contractors and Subcontractors.** Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. There are two recognized exceptions to the general rule which may allow the employer of an independent contractor to be held vicariously liable to a third party. Those two exceptions are where (1) the employer retains control over the contractor's work or (2) the employer has a nondelegable duty to protect another from harm.

6. **Negligence: Contractors and Subcontractors.** Nondelegable duties include (1) the duty of an owner in possession and control of premises to provide a safe place for work by an independent contractor's employee, (2) a duty imposed by statute or rule of law, and (3) the duty of due care when the independent contractor's work involves special risks or dangers.
7. **Negligence: Liability: Contractors and Subcontractors: Words and Phrases.** A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed.
8. **Negligence: Liability: Contractors and Subcontractors.** Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence.
9. **Negligence: Words and Phrases.** A peculiar risk must involve some special hazard resulting from the nature of the work done, which calls for special precautions.
10. **Contractors and Subcontractors: Employer and Employee.** The duty of a general contractor to employees of a subcontractor extends only to providing a reasonably safe place to work as distinguished from apparatus, tools, or machinery furnished by the subcontractor for the use of his own employees.

Appeal from the District Court for Dodge County: JOHN E. SAMSON, Judge. Affirmed.

Michaela Skogerboe and James E. Harris, of Harris Kuhn Law Firm, L.L.P., for appellant.

Patricia McCormack and Eugene L. Hillman, of Hillman, Forman, Nelsen, Childers & McCormack, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

WRIGHT, J.

## NATURE OF CASE

Rick Eastlick was employed as a bricklayer for Monona Masonry, Inc. (Monona), which was doing masonry work at a church construction site in Fremont, Nebraska. Eastlick was working on scaffolding when it collapsed, and he sustained serious injuries. The general contractor for the project was Lueder Construction Company (Lueder). Eastlick sued Lueder for damages. The district court concluded that Lueder owed no duty to Eastlick related to the accident, and it granted Lueder's motion for summary judgment. Eastlick appeals.

## SCOPE OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Papillion Rural Fire Prot. Dist. v. City of Bellevue, ante* p. 214, 739 N.W.2d 162 (2007). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

## FACTS

On October 24, 2000, Eastlick was working on scaffolding at a church construction project. The scaffolding collapsed, and Eastlick fell approximately 20 feet to the ground, sustaining injuries, including a fracture of the right femur that required surgery. Eastlick also developed posttraumatic stress disorder.

The metal scaffolding was described as a "Morgan scaffold." The sections of scaffolding stacked on top of each other, with planks in between to allow workers to walk on the scaffolding. The scaffolding was held together by straight braces and "X" braces. The planks were mechanically raised as brickwork was finished and the work area became higher from the ground.

On the day of Eastlick's accident, two sections of scaffolding were in place, but no planks had been set up. Another bricklayer, Jesse Stout, said he and Eastlick were directed by a Monona employee to change the straight brace at the top of the scaffolding. They climbed to the top of the scaffolding, and Eastlick removed an X brace rather than a straight brace, resulting in a collapse of the scaffolding.

Richard Gegzna, who worked as a bricklayer foreman for Monona at the time of the accident, explained that a Morgan scaffold is a single tower connected together in 9-foot sections with a cable crank. Sections can be added using X braces and straight braces. Eastlick and Stout climbed the scaffolding to change a straight brace that held the scaffolding together because one of the bars was bent. Gegzna's back was turned when the accident occurred, but he saw the two men hit the

ground. He examined the scaffolding later and determined that pins had been removed from the X brace on Eastlick's side of the scaffolding. Gegzna testified that if an X brace and a straight brace were both removed, the scaffolding could fall.

According to Gegzna, Lueder did not recommend the type of scaffolding or provide instructions on setup or dismantling. Lueder did not direct Monona as to the tools to be used, but Lueder had specifications on how the work should be done, and it had a safety program and policy. Gegzna did not recall whether Monona employees participated in Lueder's safety program.

Wayne Schiltz, a field supervisor for Monona at the time of the accident, stated that the Morgan scaffolding owned by Monona was used on the jobsite. Lueder did not deliver or make repairs to the Morgan scaffolding and had nothing to do with how the scaffolding was erected. Schiltz said that Eastlick had experience with scaffolding and usually helped with repairs of scaffolding or replacement of parts.

Schiltz described the X brace as a unit with a pin through the center of it. The straight brace holds the scaffolding together and stabilizes the X brace. It takes three people to safely erect or dismantle the scaffolding. Schiltz said that Eastlick had damaged a brace with a forklift as the scaffolding was brought in and that Schiltz directed Eastlick and Stout to replace the brace. They leaned a section of scaffolding against another section and then removed the bent brace without first replacing it. The scaffolding then fell. Schiltz did not see the accident, but he saw that the scaffolding had collapsed.

Schiltz opined that it was "[u]nbelievable for two men that has [sic] worked for us for many years with the same very equipment and do something so horrendous as that. It's unbelievable." Eastlick and Stout told Schiltz that they had pulled the pins out of the brace. Three pins were missing from the collapsed scaffolding.

Eastlick filed a complaint against Lueder, Monona, and American Family Mutual Insurance Company on October 20, 2004, alleging that Lueder, as the general contractor, had control and supervision over all aspects of the construction project and had a duty to foresee that the masonry work was likely to

create peculiar risks or involve peculiar or inherent dangers. Eastlick alleged that Lueder (1) violated its nondelegable duty to provide a reasonably safe place to work; (2) violated its statutory duties under the requirements of the Occupational Safety and Health Administration (OSHA); (3) violated its nondelegable duties to see that the work performed by the independent contractors involving peculiar risks was done with a requisite degree of care by taking adequate safety precautions and measures; and (4) failed to ensure that the scaffolding was erected, moved, and dismantled under the supervision of or by a competent, qualified person.

Eastlick alleged that as a result of the accident, he was injured and incurred hospital, medical, and related health care expenses. He claimed that he was totally disabled from October 24 through December 4, 2000, resulting in lost wages of $6,945, and that he would continue to sustain lost earnings and loss of earning capacity in the future.

Lueder denied Eastlick's allegations but admitted it was the general contractor for the construction project. Lueder alleged that Eastlick's exclusive remedy was workers' compensation; that Lueder owed no duty of care to Eastlick, who was an employee of a subcontractor; and that the use of scaffolding did not involve a peculiar risk or constitute an ultrahazardous activity.

The district court sustained Lueder's motion for summary judgment and overruled Eastlick's motion for partial summary judgment. The court found that the peculiar risk doctrine did not apply. There was no dispute that Monona owned the scaffolding and that the scaffolding had been erected by Monona employees. The court found that Lueder's duty to Eastlick extended only to provide a reasonably safe place to work and did not include a duty to inspect equipment that was owned, directed, or controlled by Monona. There was no dispute that Monona was cited by OSHA for safety violations and that Lueder was not cited for any OSHA violation. The court concluded that the record did not support an action for negligence against Lueder.

Eastlick's motion to reconsider was overruled, and he timely perfected this appeal.

## ASSIGNMENTS OF ERROR

Eastlick assigns the following errors, summarized and restated: The district court erred (1) in finding that Lueder, as general contractor, owed no duty to Eastlick and that Eastlick had no claim against Lueder for his injuries; (2) in dismissing Eastlick's claim based on the finding that Lueder had no duty to inspect equipment owned, directed, and controlled by its subcontractor (Monona), where Eastlick's claim was based on an unsafe condition and activity on the premises; (3) in finding that the work performed by Eastlick at the time of the accident did not create a peculiar risk of physical harm without the taking of special precautions; (4) in finding that there was no breach of Lueder's duty to Eastlick, which was an issue of fact; and (5) in failing to find that Lueder owed Eastlick a duty to keep the premises in a reasonably safe condition.

## ANALYSIS

Eastlick, who was employed as a bricklayer for Monona, sustained serious injuries when the scaffolding he was standing on collapsed. Eastlick alleged that Lueder's negligence resulted in his injuries. In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. *National Am. Ins. Co. v. Constructors Bonding Co.*, 272 Neb. 169, 719 N.W.2d 297 (2006).

The first issue is whether Lueder, the general contractor, owed Eastlick a duty to protect him from the injury that occurred. Related to this issue is whether Lueder maintained control over Eastlick's workplace and whether Lueder breached any of its nondelegable duties to Eastlick by failing to provide a safe place to work, violating a statute or rule of law, or violating its duty of due care if Eastlick's work involved a special risk.

[3,4] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Id.*

Lueder was the general contractor on the jobsite pursuant to a written construction contract with the owner. The contract provided that Lueder was required to supervise and direct the work at the site; that the contractor was responsible to the owner for acts and omissions of the contractor's employees, subcontractors, and their agents or employees; and that the contractor was responsible for initiating, maintaining, and supervising all safety precautions and programs. The subcontract between Lueder and Monona included a provision that the subcontractor, Monona, agreed to assume the entire responsibility and liability for all damages or injury to all persons arising out of or resulting from the execution of the work provided for in the subcontract.

[5,6] Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Id.* There are two recognized exceptions to the general rule which may allow the employer of an independent contractor to be held vicariously liable to a third party. "Those two exceptions are where (1) the employer retains control over the contractor's work or (2) the employer has a nondelegable duty to protect another from harm." *Id.* at 34, 718 N.W.2d at 490. Nondelegable duties include (1) the duty of an owner in possession and control of premises to provide a safe place for work by an independent contractor's employee, (2) a duty imposed by statute or rule of law, and (3) the duty of due care when the independent contractor's work involves special risks or dangers. See *id.*

The contract between Lueder and Monona required that Monona assume the entire responsibility and liability for any injury to any person arising out of the work done by Monona. There was no evidence that Lueder had control over the work being done by Eastlick. Although Lueder had control of the jobsite, it did not control Eastlick's work or the tools and scaffolding that he was using.

There is no dispute that the scaffolding was owned, maintained, erected, and dismantled by Monona. It was intended for use by Monona and its employees. Although Lueder had a supervising role, it did not direct the masonry work done by Monona, nor did it have control over the manner in which the

masonry work was done. There was no evidence that Lueder had control over the work performed by Monona.

[7,8] Eastlick argues that Lueder owed a nondelegable duty to him to keep the premises in a reasonably safe condition. "A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed." *Dellinger v. Omaha Pub. Power Dist.*, 9 Neb. App. 307, 311-12, 611 N.W.2d 132, 137 (2000), citing *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence. *Dellinger v. Omaha Pub. Power Dist., supra.*

Lueder has not disputed that it had a nondelegable duty to provide a safe place to work for Monona employees. The record shows that Eastlick was not injured because the workplace was unsafe. Rather, he was injured when he removed a brace on the scaffolding in an incorrect manner. The scaffolding was owned, erected, and maintained by Monona, Eastlick's employer, and not by Lueder, the general contractor. There was no evidence presented to show that Lueder breached any nondelegable duty to provide a safe workplace.

Eastlick also argues that Lueder was negligent by statute or rule of law because OSHA regulations provide that Lueder should have ensured that Eastlick had proper training to work on the scaffolding. He also claims that the court cannot infer that Lueder did not violate an OSHA standard because Lueder was not cited by OSHA.

As the district court noted, there was no dispute in the evidence that the scaffolding was owned and erected by Monona and that Monona was cited for OSHA violations. There was no evidence that Lueder was cited for any OSHA violation. The court stated that Nebraska statutes pertaining to scaffolding place the responsibility for proper erection and dismantling of scaffolding on the company that owns and maintains the scaffolding in use. See Neb. Rev. Stat. §§ 48-425 and 48-428 (Reissue 2004). The Nebraska statutes pertaining to scaffolding safety have been applied by this court to persons who erect,

construct, or supply the scaffolding. See *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973). The district court found no support for an action for negligence against Lueder by rule of law or statute, and we agree.

[9] Eastlick also argues that the overwhelming weight of the evidence supports a finding that the acts of moving and dismantling scaffolding involve special risks or dangers, which imposed a duty of due care on Lueder. A peculiar risk must involve some special hazard resulting from the nature of the work done, which calls for special precautions. *Dellinger v. Omaha Pub. Power Dist., supra.*

Examples of types of work which this court has previously held to demonstrate peculiar risks include steel construction work (*Parrish v. Omaha Pub. Power Dist., supra*), painting the inside of an underground tank creating highly combustible paint fumes (*Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994)), and steamfitter work near the opening on a floor deck that exposed vertical reinforcing rods (*Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972)).

In *Dellinger v. Omaha Pub. Power Dist.*, 9 Neb. App. 307, 611 N.W.2d 132 (2000), the Nebraska Court of Appeals distinguished cases in which an injury can be traced to an act of negligence, such as the failure to fasten one end of a board on a scaffoldlike structure, from those in which a peculiar risk is associated with the work being done. Although there may have been peculiar risks associated with the steel construction work the employee was doing, the actual risk he faced was the result of a failure to properly secure a piece of equipment.

The case at bar is similar. The injury Eastlick sustained was not the result of merely working on the scaffolding, but was the result of a failure to follow proper procedures. There was no evidence that the acts of erecting, repairing, or dismantling the scaffolding carried with them a peculiar risk, although certain safety precautions were necessary. The record does not show that the district court erred in finding that the peculiar risk doctrine did not apply to the facts of this case. There is no evidence that Lueder breached any nondelegable duty arising as a result of any peculiar risk associated with Eastlick's work on the scaffolding.

Eastlick relies on *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993), in which this court reversed the award of summary judgment granted to the owner and the general contractor. However, in that case, the owner of the construction site specifically retained the right to inspect all work, the right to monitor overall progress of the work, and the right to take over the construction if the general contractor failed to perform the work according to the contract. A licensed professional engineer who worked for the owner was stationed at the site for daily contact with the work. He exerted some supervisory control over the construction. The project manager for Omaha Public Power District was involved in coordinating and supervising the work of the general contractor throughout the construction. This court noted that the district's personnel at the construction site were active participants and not just passive observers.

*Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973), is more applicable to the case at bar. An employee of a masonry subcontractor sued a general contractor for injuries the employee sustained in a fall from a scaffold. The contract between the owner and the general contractor provided that the contractor would take all necessary precautions for the safety of employees.

[10] This court noted that the instrumentality which caused the injury was not the premises, but, rather, was the equipment owned, controlled, and erected by the subcontractor, who was the employer of the injured worker. The evidence did not establish that the general contractor had any right to control the instrumentalities used by the subcontractor. We held that "the duty of a general contractor to employees of a subcontractor extends only to providing a reasonably safe place to work as distinguished from apparatus, tools, or machinery furnished by the subcontractor for the use of his own employees." *Id.* at 197, 206 N.W.2d at 838.

"[A] general contractor's mere failure to inspect a scaffold owned, erected, and controlled by the subcontractor and furnished by the subcontractor for the use of his own employees does not make the general contractor liable to the subcontractor's employees for injuries caused by defects in the scaffold."

*Id.* at 197, 206 N.W.2d at 838-39. A contractual provision stating that the general contractor would take all necessary precautions for the safety of employees working on the jobsite did not enlarge the common-law duty of the general contractor to a subcontractor's employees such that the general contractor would be required to inspect tools, equipment, and apparatus furnished by the subcontractor for the exclusive use of its own employees. *Id.*

In the present case, the record shows that Eastlick was injured after he and Stout climbed the scaffolding to change a brace. Eastlick removed the brace before its replacement had been fastened, and the scaffolding fell to the ground. Gegzna, a foreman for Monona, Eastlick's employer, testified that Lueder did not recommend the type of scaffolding, provide instructions on its setup or dismantling, or direct Monona as to the tools to be used. Schiltz, a field supervisor for Monona, stated that the scaffolding was owned by Monona. Lueder did not deliver or make repairs to the scaffolding and had no part in its erection. It was Schiltz who directed Eastlick and Stout to repair the scaffolding. Eastlick had experience working with the scaffolding and frequently helped with repairs or replacement. Schiltz found it "unbelievable" that employees with the experience of Eastlick and Stout would attempt to change the brace without first replacing it.

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Papillion Rural Fire Prot. Dist. v. City of Bellevue, ante* p. 214, 739 N.W.2d 162 (2007). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

We have reviewed the evidence in a light most favorable to Eastlick and given him the benefit of all reasonable inferences deducible from the evidence. We find that there was no genuine issue of material fact as to whether Lueder owed any nondelegable duty to Eastlick beyond providing a safe place to work.

Eastlick's injuries were not the result of an unsafe premises, but, rather, the result of work completed in a negligent manner. Thus, the evidence supports the district court's finding that Lueder was entitled to summary judgment.

## CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

McCORMACK, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
JEFFREY HESSLER, APPELLANT.
741 N.W.2d 406

Filed November 30, 2007. No. S-05-629.

1. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion.
2. **Trial: Juries: Appeal and Error.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.
3. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.
4. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
6. **Right to Counsel: Waiver: Appeal and Error.** In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.
7. **Criminal Law: Pleas.** A criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made.
8. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving

a litigant of a substantial right and denying a just result in matters submitted for disposition.

9. **Double Jeopardy: Prior Convictions.** The use of a prior offense to prove an aggravating circumstance under Neb. Rev. Stat. § 29-2523(1)(a) (Cum. Supp. 2006) does not increase the penalty for the prior offense and does not expose the defendant to new jeopardy for such offense. Because the use of evidence of a prior offense to prove an aggravating circumstance under § 29-2523(1)(a) does not expose the defendant to new jeopardy for the prior offense, such use does not violate the Double Jeopardy Clause.
10. **Jurors: Appeal and Error.** The erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.
11. **Trial: Juries.** In decisions regarding challenges to potential jurors, deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.
12. **Right to Counsel: Waiver.** The two-part inquiry into whether a court should accept a defendant's waiver of counsel is, first, a determination that the defendant is competent to waive counsel and, second, a determination that the waiver is knowing, intelligent, and voluntary.
13. **Trial: Mental Competency: Pleas: Right to Counsel: Waiver.** A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel. As in any criminal case, a competency determination is necessary only when the court has reason to doubt the defendant's competence.
14. **Sentences: Rules of Evidence.** The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
15. **Courts: Sentences: Rules of Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.
16. **Death Penalty: Records.** The sentencing court, in imposing the death penalty, has the statutory authority to consider the trial record.
17. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** Proportionality review under Neb. Rev. Stat. § 29-2521.03 (Reissue 1995) looks only to other cases in which the death penalty has been imposed and requires the Nebraska Supreme Court to compare the aggravating and mitigating circumstances of a case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

MILLER-LERMAN, J.

## I. NATURE OF CASE

Jeffrey Hessler was convicted in the district court for Scotts Bluff County of first degree murder, kidnapping, first degree sexual assault on a child, and use of a firearm to commit a felony. Following Hessler's conviction for first degree murder, the jury found that three statutory aggravating circumstances existed. After the convictions and findings of aggravating circumstances but prior to sentencing, the court granted Hessler's pro se request to waive counsel for the remainder of the case. Hessler appeared pro se at the sentencing proceeding. In its sentencing order, the sentencing panel accepted the jury's verdicts finding that three statutory aggravating circumstances existed. The panel further concluded that no statutory or nonstatutory mitigating factors were established, that mitigating factors did not approach or exceed the weight of the aggravating circumstances, and that a death sentence would not be excessive or disproportionate to sentences previously imposed in similar circumstances. The panel therefore sentenced Hessler to death for first degree murder; to life imprisonment without parole for kidnapping; to 40 to 50 years' imprisonment for sexual assault; and to 20 to 25 years' imprisonment for the firearms conviction, with each sentence to be served consecutively to the others.

This automatic appeal followed. After Hessler filed a pro se brief assigning no error, we appointed counsel to represent Hessler on appeal. Appointed counsel filed a brief assigning various errors with respect to the guilt, aggravation, and sentencing phases of the trial. We affirm Hessler's convictions and sentences.

## II. STATEMENT OF FACTS

On the morning of February 11, 2003, 15-year-old Heather Guerrero left her home in Gering, Nebraska, to make deliveries on her newspaper route. Heather never returned home. A search was conducted, and on the morning of February 12, Heather's body was found in the basement of an abandoned house near Lake Minatare, Nebraska.

During the investigation of Heather's disappearance, a witness who was walking his dog on the morning of February 11, 2003, reported that he had heard a scream and had seen a silver or tan Nissan Altima drive by at a high rate of speed. A car matching that description belonged to a friend of Hessler's who had allowed Hessler to drive the car. A search of the car revealed three boxes of live ammunition, some spent casings, and Hessler's wallet. After police questioned Hessler, Hessler gave police his semiautomatic handgun. In response to interrogation, Hessler admitted to having sex with Heather but asserted that it was consensual. Hessler said that after Heather indicated she would not keep the encounter secret, he "freaked out," took her to the basement of the abandoned house, and shot her.

On February 26, 2003, the State filed an information charging Hessler with five counts in connection with the death of Heather: count I, premeditated murder; count II, felony murder; count III, kidnapping; count IV, first degree sexual assault; and count V, use of a firearm to commit a felony. In connection with counts I and II, the State gave notice of aggravating circumstances and alleged that under Neb. Rev. Stat. § 29-2523 (Cum. Supp. 2006), (1) Hessler had a substantial prior history of serious assaultive or terrorizing criminal activity (§ 29-2523(1)(a)); (2) the murder was committed in an effort to conceal the commission of the crimes of the kidnapping and sexual assault of Heather and the sexual assault of another girl, J.B. (§ 29-2523(1)(b)); and (3) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence (§ 29-2523(1)(d)).

On May 19, 2003, Hessler made an oral motion to plead guilty to count II, felony murder, and to count IV, first degree sexual assault. The court responded that it would deny the motion until it had time to research the issue. Hessler filed a written motion to plead guilty on June 4, and a hearing was held June 18. The court denied the motion in an order dated July 25. The court stated that Hessler did not have an absolute right to have his plea accepted and that accepting the plea would cause more uncertainty than finality because both counts I and II charged Hessler with first degree murder and accepting a plea on one of the counts would create confusion as to whether trial was necessary or permitted on the other count. Hessler attempted to appeal the July 25 order, but this court dismissed the appeal for lack of jurisdiction. *State v. Hessler*, 267 Neb. xxii (No. S-03-967, Feb. 11, 2004).

On April 9, 2004, Hessler filed a motion to plead guilty to the count of felony murder and to all remaining counts other than premeditated murder. A hearing on the motion was scheduled for April 14. On that day, the State filed a motion to dismiss the count of felony murder. At the hearing, the court first considered the State's motion to dismiss. The court sustained the motion to dismiss the count of felony murder and then denied Hessler's motion to plead guilty to that count. Hessler declined to plead guilty to the remaining counts. Hessler attempted to appeal the April 14 order, but this court again dismissed the appeal. *State v. Hessler*, 268 Neb. xxiv (No. S-04-497, Sept. 1, 2004), *cert. denied* 543 U.S. 1161, 125 S. Ct. 1320, 161 L. Ed. 2d 131 (2005).

On October 6, 2004, Hessler filed a plea in bar in which he asserted that he had previously been convicted and sentenced for an offense relating to another victim which he claimed was an element of the capital murder charge set forth in this case. During the investigation of the death of Heather, police linked Hessler to the August 20, 2002, sexual assault of J.B., who, like Heather, was a teenage girl who was delivering newspapers at the time she was assaulted. The State charged Hessler in connection with the sexual assault of J.B. After the crimes were committed and the charges filed in the instant case, on July 14, 2003, Hessler pled no contest to first degree sexual assault of

J.B. Hessler was sentenced on August 21 to imprisonment for 30 to 42 years for the sexual assault of J.B. He did not appeal the conviction or sentence. In the plea in bar filed in this case, Hessler asserted that the Double Jeopardy Clause barred use of the sexual assault of J.B. to prove an aggravating circumstance in the present case because such use would subject him to a second prosecution and punishment for the sexual assault of J.B. On November 17, 2004, the court overruled Hessler's plea in bar. Hessler attempted to appeal the denial, but on November 24, we dismissed the appeal for lack of jurisdiction. *State v. Hessler*, 268 Neb. xxv (No. S-04-1304, Nov. 24, 2004).

Jury selection in Hessler's trial began November 29, 2004. Jury summonses had been sent to 250 people, and potential jurors were sent a supplemental questionnaire which asked, inter alia, whether the potential juror had formed an opinion about Hessler's guilt or innocence and the basis for such opinion. The venire included 107 potential jurors. The court excused 65 potential jurors, leaving 42 potential jurors upon whom the parties could exercise peremptory challenges. Hessler made motions to excuse six potential jurors for cause. The court overruled the motions after questioning the potential jurors regarding, inter alia, whether they could set aside their opinions and render impartial verdicts. Hessler later used peremptory challenges to remove four of the potential jurors he had sought to excuse, and the State used a peremptory challenge to remove one.

Only one of the six potential jurors that Hessler moved to excuse became a member of the jury. That juror was R.C.F. In response to questioning by the court and by Hessler, R.C.F. stated that he had formed the opinion that Hessler was guilty based on newspaper reports. R.C.F. initially stated, "I do not presume that he's innocent, no, sir." However, R.C.F. stated in response to questioning from the court that his opinion was not so strong that he could not set it aside and take an oath to render a fair and impartial verdict based solely upon the evidence presented at trial and the instructions given by the court. In reply to a question from Hessler's counsel, R.C.F. responded that Hessler did not need to prove his innocence and stated: "If I felt without a shadow of a doubt that he was guilty I would

say so but I would not . . . Hessler does not prove that he's innocent or guilty, I realize that comes from the State, not from [the defense]." R.C.F. also stated:

> I believe in the death penalty but I also believe in a fair and impartial trial and I can set aside those feelings and those opinions and listen to the facts.
>
> . . . .
>
> . . . [I]f the facts are such that the death penalty is not warranted, then I could be very fair and impartial.

Following examination of the venire but before the exercise of peremptory challenges, Hessler made an oral motion to change venue. Hessler asserted that he could not receive a fair trial in Scotts Bluff County and argued that his assertion was supported by responses to questionnaires indicating that a large number of potential jurors had formed the opinion that he was guilty. The court overruled the motion to change venue.

At trial, a videotape of the February 12, 2003, interrogation of Hessler was played to the jury. Other evidence at trial included, inter alia, testimony of a firearms examiner who opined that Hessler's gun fired the cartridge found near Heather's body, testimony of a medical technologist who testified that DNA testing could not exclude Heather as a contributor to DNA found on Hessler's clothing and in the car Hessler was using, and testimony of a doctor who performed an autopsy on Heather's body and who testified that a gunshot wound to the head caused her death and that injuries to her vaginal area could be consistent with either forcible penetration or consensual sex. On December 7, 2004, the jury returned verdicts of guilty on the counts of first degree murder, kidnapping, first degree sexual assault, and use of a firearm to commit a felony.

Following the verdicts, and prior to and during the aggravation hearing, Hessler filed various motions, including, inter alia, motions to declare the Nebraska death penalty statutes unconstitutional on various bases, a motion based on double jeopardy grounds to prohibit the State from presenting evidence at the aggravation hearing regarding the sexual assault of J.B. and from seeking a verdict on the aggravating circumstance found in § 29-2523(1)(a) based on such evidence, and a motion for a jury instruction at the aggravation hearing requiring the jury

to make unanimous, written findings of fact in support of any aggravating circumstances the jury found to exist. Although Hessler later waived counsel, Hessler was represented by counsel in connection with the court's consideration of his various motions, including his constitutional challenge to the death penalty statutes, his Double Jeopardy challenge involving J.B., and his jury instruction request. The court overruled the motions. At the aggravation hearing, the State presented, inter alia, evidence of the sexual assault of J.B. On December 9, 2004, the jury found that all three aggravating circumstances alleged by the State existed.

On March 31, 2005, Hessler filed a pro se motion titled "Motion to Invoke My Sixth-Amendment Right and to Expurgate the Advocate of the State and to Delineate Myself." The court had a hearing scheduled to consider various motions filed by counsel on the day Hessler filed his pro se motion. At the hearing, the court first considered Hessler's pro se motion. After questioning Hessler, the court determined that by the motion, Hessler sought to remove his counsel, waive his right to counsel, and appear pro se at sentencing. The court then questioned Hessler about his "current status and mental abilities" which included questions regarding his age, his education, and his understanding of the proceedings. In response to the questions, Hessler indicated that he had been prescribed unspecified "antipsychotics" and "antihypnotic" drugs but that he had not taken his medications that particular day. The court further questioned Hessler regarding his understanding of his right to counsel, of what he would forgo if he waived his right to counsel, and of what would be required of him in order to represent himself in further proceedings. In response to questions regarding his ability to represent himself against the State, which would be represented by attorneys, Hessler said, "I've got God on my side, God's guiding me. . . . I just go by what God tells me." He also indicated that he was not concerned "because [his] wishes are the same as the State." Hessler further indicated that although he was not generally dissatisfied with his counsel's performance, he wanted to represent himself because counsel "refuse[d] to comply with [his] wishes." Following such questioning, the court found that Hessler had "knowingly,

intelligently, [and] voluntarily decided to represent himself in this case." The court nevertheless instructed counsel to prepare for the sentencing hearing and to be on standby at sentencing in the event that Hessler changed his mind and wished to consult with counsel. Although Hessler indicated his intent to withdraw various motions made by counsel, including a motion challenging electrocution as a method of execution, the court allowed counsel to present evidence in support of such motions in order to make a complete record.

On May 16, 2005, the sentencing proceeding was held before a sentencing panel that included the trial judge and two other judges. Hessler appeared pro se but his former counsel was present on standby. At the beginning of the hearing, the presiding judge again questioned Hessler regarding his decision to appear pro se. Hessler indicated that he still wanted to appear pro se, that he understood his right to counsel and the consequences of proceeding without counsel, and that no one had made promises or threats or done anything to get him to waive counsel. The court again stated its finding that Hessler knowingly, intelligently, and voluntarily waived his right to counsel but told Hessler that he could inform the court if at any time he wished to be assisted by standby counsel.

At the sentencing hearing, Hessler offered into evidence, and the court received, a document signed by Hessler titled "Interlocutory Statement of the Defendant." In the document, Hessler requested the sentencing panel "to bring the Justice and Wrath of GOD onto myself." He further requested that "the True Intentions of This Court follows GOD'S COMMANDS and My Wishes and that is to ONLY to be the following . . . . I, JEFFREY ALAN HESSLER , MUST BE PUT TO DEATH WITHOUT DIALECTIC."

The document continued for several more pages in which Hessler discussed his remorse for the death of Heather, his opinion that death was the proper punishment, his feelings regarding the progress of the trial, and his life in general. Hessler offered no other evidence which would bear on mitigating circumstances or other factors to be considered in connection with sentencing.

The State asked the court "to take judicial notice of all the exhibits that were received at trial and the aggravation hearing

as well." The court had previously received into evidence "a two volume transcript of the proceedings of both the trial and the aggravation hearing," and the court stated that it would "make all the exhibits from the two proceedings available for the three-judge panel for their consideration and deliberations." The State offered no further evidence. Hessler declined to make a closing statement in his own behalf. The State made a closing statement in which it urged the panel to impose a death sentence for first degree murder and to impose the maximum sentences on the other counts. Hessler declined to rebut the State's closing statement. The court informed Hessler that he had a "final opportunity to make a statement to the court" regarding anything he wanted the court to consider. Hessler declined to make a statement.

Later that day, the sentencing panel announced its decision and entered its sentencing order. The panel recited the relevant facts and, finding the facts true beyond a reasonable doubt, unanimously accepted the jury's verdicts. The panel next found that the three asserted aggravating circumstances existed beyond a reasonable doubt and unanimously accepted the jury's findings regarding aggravating circumstances. The panel then considered mitigating circumstances but unanimously concluded that no statutory and no nonstatutory mitigating factors were established in this case. The panel further unanimously concluded beyond a reasonable doubt that an imposition of death would not be excessive or disproportionate to sentences previously imposed in similar circumstances. The panel finally unanimously concluded that (1) aggravating circumstances justified imposition of a death sentence; (2) mitigating circumstances did not approach or exceed the weight given to aggravating circumstances; and (3) a death sentence would not be excessive or disproportionate to penalties imposed in similar cases, considering both the crime and the defendant. The panel imposed sentences of death for first degree murder, life imprisonment without parole for kidnapping, imprisonment for 40 to 50 years for first degree sexual assault on a child, and imprisonment of 20 to 25 years for use of a firearm to commit a felony. The panel ordered that each sentence be served consecutively to the others.

This automatic appeal followed.

## III. ASSIGNMENTS OF ERROR

On August 9, 2005, Hessler filed a pro se appellant's brief in which he assigned no error. Instead, in the brief, Hessler repeated much of the content of the document he entered into evidence at the sentencing hearing. A replacement brief order was issued by the Clerk of the Supreme Court, and in response, Hessler informed this court that he did not want nor did he file this appeal and that he would not file any more briefs or other statements. This court on September 28, 2005, appointed counsel to represent Hessler in this automatic appeal. Counsel subsequently filed an appellant's brief on Hessler's behalf.

Hessler, through counsel, asserts that the district court erred in (1) denying his motions to plead guilty to felony murder; (2) violating the Double Jeopardy Clause by allowing the State to use the sexual assault of J.B. to prove an aggravating circumstance; (3) failing to excuse for cause potential jurors who had formed opinions regarding Hessler's guilt; (4) overruling his motion to change venue; (5) overruling his motion to declare Nebraska death penalty statutes unconstitutional on various bases, including (a) vagueness of aggravating circumstances described in § 29-2523(1)(a), (b), and (d); (b) failure to require or allow the jury to determine mitigating circumstances, to assign a weight to aggravating circumstances, and to determine the sentence; and (c) unconstitutionally penalizing a defendant's exercise of the right to a jury trial on aggravating circumstances; (6) denying his request for an instruction in the aggravation phase requiring the jury to make unanimous, written findings of fact to support each aggravating circumstance found to exist; (7) granting his request to waive counsel and appear pro se at sentencing and failing to make a determination regarding his competency to waive counsel; and (8) receiving into evidence at sentencing the records of the guilt and aggravation phases of the trial.

## IV. STANDARDS OF REVIEW

[1] A trial court is given discretion as to whether to accept a guilty plea; this court will overturn that decision only where

there is an abuse of discretion. *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004).

[2] The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

[3] A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

[4] The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

[5] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Blair*, 272 Neb. 951, 726 N.W.2d 185 (2007).

[6] In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review. *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

## V. ANALYSIS

### 1. No Abuse of Discretion in Denial of Motions to Plead Guilty to Felony Murder

In his first assignment of error, Hessler asserts that the district court erred when it denied his motions to plead guilty to the felony murder count. Although the assignment of error mentions the granting of the State's motion to dismiss the felony murder count, Hessler makes no specific argument regarding the dismissal. We therefore treat the assignment of error as limited to the denial of Hessler's motions to plead guilty to felony murder. See *In re Interest of Michael U.*, 273 Neb. 198, 728 N.W.2d 116 (2007) (errors assigned but not argued will not be

addressed by appellate court). A trial court is given discretion as to whether to accept a guilty plea; this court will overturn that decision only where there is an abuse of discretion. *Brown, supra*. We conclude that the court did not abuse its discretion when it denied Hessler's motions to plead guilty to felony murder.

As noted above, the State originally charged Hessler with both premeditated murder and felony murder and denominated the two as separate counts in the information. Hessler twice moved the court to allow him to plead guilty to felony murder, and the court denied both motions. In its order denying Hessler's first motion to plead guilty, the court noted that if the plea to felony murder were accepted, there would be confusion as to whether Hessler should thereafter also be tried for premeditated murder. The court determined that accepting the plea "would create more uncertainty than finality, would not eliminate the need for a full trial of the facts either at the evidentiary phase or the sentencing phase, and would not significantly save costs or court time."

Hessler asserts that the court's reasons are clearly untenable. He argues that the State assumed the risk of his pleading to one count when it charged premeditated murder and felony murder as separate counts and that the court acted as a safety net and unfairly assisted the prosecution by saving it from this tactical error. Hessler asserts that he had valid reasons to plead guilty to felony murder, including a strategy to avoid the death penalty, his feelings of remorse and desire to accept responsibility for the crime, and a desire to spare his family and the victim's family the emotional trauma of a trial.

[7,8] With regard to whether courts must accept a defendant's plea of guilty, we have stated:

> It is well established that a criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made. . . . Our cases recognize that a trial court has a large measure of discretion in deciding whether to accept a guilty plea.

*State v. Brown*, 268 Neb. 943, 947, 689 N.W.2d 347, 351 (2004) (citations omitted). We stated in *Brown* that our jurisprudence

grants trial courts "wide discretion in rejecting plea agreements for substantive reasons." 268 Neb. at 950, 689 N.W.2d at 352. This court will overturn a decision on whether to accept a plea of guilty only where there is an abuse of discretion. *Id.* A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

Although we do not necessarily agree with each substantive reason recited by the court, we find no abuse of discretion in the decision to deny the motions to plead guilty to felony murder. Hessler had no absolute right to plead guilty, see *Brown, supra*, and therefore, the ruling did not deprive him of a substantial right. Nor did the ruling deny Hessler a just result. Hessler argues that his desire to plead guilty to felony murder was part of a strategy to avoid the death penalty. However, felony murder and premeditated murder are both theories of first degree murder subject to the death penalty. See *State v. Nesbitt*, 264 Neb. 612, 633, 650 N.W.2d 766, 785 (2002) ("premeditated murder and felony murder are simply alternate methods of committing first degree murder"). Had Hessler pled guilty to felony murder, he still would have stood convicted of first degree murder and the death penalty still would have been a possible sentence. Also, a plea to felony murder would not necessarily have spared Hessler's family and the victim's family the emotional trauma of a trial on other counts. With the death penalty still a possible sentence, trial still would have been required on the aggravating circumstances, and the sentencing panel still would have been required to consider the circumstances of the crime. The State likely would have presented much of the evidence it presented in the guilt phase of the trial at the aggravation and sentencing phases if Hessler had been allowed to plead.

Because the denial did not deprive Hessler of a substantial right or a just result, we conclude that the court's denial of Hessler's motions to plead guilty to felony murder was within the court's "wide discretion." See *Brown, supra*. We reject Hessler's first assignment of error.

### 2. No Double Jeopardy Violation in Use of Prior Sexual Assault of Another Victim to Prove Aggravating Circumstance

In his second assignment of error, Hessler asserts that the district court erred in various rulings. As Hessler argues this assignment of error, his general claim is that the court erred in allowing the State to use his prior sexual assault of J.B. to prove the aggravating circumstance of § 29-2533(1)(a), prior history of serious assaultive criminal activity, and that such use subjected him to a second punishment for that crime in violation of the Double Jeopardy Clause. We conclude that use of the prior sexual assault of J.B. to prove an aggravating circumstance did not violate the Double Jeopardy Clause.

Hessler argues that as the crime in the present case was charged, the sexual assault of J.B. was an element of the offense of capital murder, and that it violated the Double Jeopardy Clause to use the prior assault, for which he had already been tried and punished, as an element of another crime. In support of his argument, Hessler cites two U.S. Supreme Court cases, *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). In *Ring*, the U.S. Supreme Court, in holding that the Sixth Amendment requires that aggravating circumstances be found by a jury, stated that "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" 536 U.S. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). In *Sattazahn*, three justices of the Court cited and quoted *Ring* and stated that "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'" 537 U.S. at 111. In determining whether the Double Jeopardy Clause applied to capital sentencing proceedings to determine the existence of aggravating circumstances, the three justices found no reason to distinguish between what constitutes an offense for Sixth Amendment jury purposes and what constitutes an offense for Fifth Amendment double jeopardy purposes. *Id.* Hessler argues

that these statements in *Ring* and *Sattazahn* mean that aggravating circumstances are elements of the offense of capital murder and that therefore, the sexual assault of J.B., which was alleged as an aggravating circumstance, was a lesser-included offense of the capital murder of Heather.

We note initially that the Nebraska Legislature has provided that "the aggravating circumstances are not intended to constitute elements of the crime generally unless subsequently so required by the state or federal constitution." Neb. Rev. Stat. § 29-2519(2)(d) (Cum. Supp. 2006). We do not believe that the explanatory comments in *Ring* and *Sattazahn* lead to the conclusion that an aggravating circumstance should be treated as an element of capital murder, and we reject Hessler's suggestion that we treat an aggravating circumstance as an element of capital murder. In *Ring*, the Court referred to aggravating circumstances as the "functional equivalents" of elements only for the purpose of resolving the question of whether a jury was required to find aggravating circumstances. In *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), the Court stated that the holding in *Ring* did not alter the range of conduct that the statutes at issue subjected to the death penalty, but instead altered the method for determining whether conduct was punishable by death by requiring a jury determination of aggravating circumstances. These statements in *Schriro* indicate that the Court did not consider aggravating circumstances to be substantive elements of the crime of capital murder. Instead, the Court considered aggravating circumstances as functional equivalents of elements for the limited purpose of determining whether Sixth Amendment jury guarantees extended to findings of aggravating circumstances.

*Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), also does not support Hessler's argument. The issue in *Sattazahn* was whether the Double Jeopardy Clause prohibited a second capital sentencing for the same crime. Three justices of the Court in *Sattazahn* stated, "If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).'"

537 U.S. at 112. The three justices determined that double jeopardy protections would attach once a jury concluded that no aggravating circumstances existed and that therefore, a second capital sentencing would be prohibited. The Court in *Sattazahn* did not state that double jeopardy protections prohibited the use of evidence of prior crimes to establish an aggravating circumstance in a subsequent case involving a different crime. Furthermore, the portions of *Sattazahn* on which Hessler relies were from a section of the opinion that was joined by only three justices, and the views expressed by the three were not endorsed by a majority of the Court. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003) (rejecting similar argument based on *Sattazahn*).

The issue in the present case is different from those in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and *Sattazahn, supra*. The issue here is whether evidence of a prior offense can be used to prove prior history as an aggravating circumstance in a capital trial involving a later offense. This question is more similar to the question of whether the sentence for a subsequent crime may be enhanced based on prior crimes. In *Witte v. United States*, 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995), the Court stated that the consideration of prior conduct in connection with sentencing for a subsequent offense does not result in additional punishment for such prior conduct. The Court stated that enhancement or recidivism statutes do not change the penalty imposed for the earlier offense and stated:

> In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

515 U.S. at 400.

[9] Under this reasoning, we determine that the use of a prior offense to prove an aggravating circumstance under § 29-2523(1)(a) does not increase the penalty for the prior offense and does not expose the defendant to new jeopardy for

such offense. Instead, the finding of an aggravating circumstance is used to increase the potential punishment for the latest crime which in the present case is first degree murder. We therefore conclude that because the use of evidence of a prior offense to prove an aggravating circumstance under § 29-2523(1)(a) does not expose the defendant to new jeopardy for the prior offense, such use does not violate the Double Jeopardy Clause.

In sum, in the present case, evidence regarding the sexual assault of J.B. was used to prove that an aggravating circumstance existed and to enhance the potential punishment for Hessler's conviction for the first degree murder of Heather. Such evidence was not used to prove a substantive element of the crime of first degree murder, and the use of such evidence did not subject Hessler to additional punishment for the sexual assault of J.B. We conclude that the use of evidence of Hessler's sexual assault of J.B. did not violate the Double Jeopardy Clause and that Hessler's second assignment of error is without merit.

### 3. No Reversible Error in Overruling of Motions to Excuse Jurors for Cause

In his third assignment of error, Hessler asserts that the district court erred when it overruled his motions to excuse various potential jurors for cause. The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). The court overruled Hessler's challenges with respect to six potential jurors, but in his brief, Hessler makes arguments with respect to only five of the six. Hessler argues that the five should have been excused for cause because each person had formed the opinion that Hessler was guilty and did not adequately demonstrate that he or she could act as an impartial juror despite such opinion. Only one of the five, R.C.F., actually became a member of the jury. Three were removed by Hessler's use of peremptory challenges, and one was removed by the State's use of a peremptory challenge. We conclude that reversal is not warranted based on those challenged individuals who did not become members of the jury and that the court did not err in overruling Hessler's motion to excuse R.C.F.

Hessler argues that each potential juror should have been struck for cause pursuant to Neb. Rev. Stat. § 29-2006(2) (Reissue 1995), which states that good cause to challenge a juror includes that "he has formed or expressed an opinion as to the guilt or innocence of the accused." Section 29-2006(2) further provides that if a potential juror has formed an opinion, the court should examine him or her regarding the grounds for such opinion. If the opinion was formed based upon "conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify," dismissal is mandatory. *Id.* See, also, *State v. Myers*, 190 Neb. 466, 209 N.W.2d 345 (1973). However, if the opinion was formed based on "reading newspaper statements, communications, comments or reports, or upon rumor or hearsay," then the person may still serve if (1) the potential juror "shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence" and (2) the court is satisfied that the potential juror "is impartial and will render such verdict." § 29-2006(2).

[10] We have stated that "the erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges." *State v. Quintana*, 261 Neb. at 52, 621 N.W.2d at 134. In this case, four of the five potential jurors that Hessler complains of on appeal were struck by the use of peremptory challenges. Under *Quintana*, there can be no reversal based on a challenge to a potential juror if that person was not ultimately included on the jury, even if the defendant was required to use a peremptory challenge to remove the person. Therefore, reversal is not warranted in this case based on the overruling of Hessler's challenges to those persons who did not become members of the jury.

[11] The only challenged individual who became a member of the jury was R.C.F. Although R.C.F. initially stated that he had formed an opinion regarding Hessler's guilt, R.C.F. also stated that such opinion was based on newspaper reports and that his opinion was not so strong that he could not set it aside and take an oath to render a fair and impartial verdict. Although during questioning by defense counsel, R.C.F. stated that "I do

not presume that he's innocent, no, sir," R.C.F. also said, inter alia, that "Hessler does not prove that he's innocent or guilty, I realize that comes from the State, not from [the defense]." Viewed in context, we believe that despite R.C.F.'s initial statements that he had formed an opinion and that he did not presume Hessler to be innocent, other later statements made by R.C.F. indicate he understood that as a juror, he needed to be and could be impartial, and that the State had the burden to prove Hessler guilty rather than Hessler's having the burden to prove himself innocent. We believe the court reasonably could have assessed R.C.F.'s statements and his demeanor and concluded that R.C.F. could render an impartial verdict. In this respect, we note that deference is given to a trial court's determinations in these matters. The U.S. Supreme Court recently stated that in decisions regarding challenges to potential jurors, "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht v. Brown*, 551 U.S. 1, 9, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (2007). Based on our review of the questioning of R.C.F., and taking R.C.F.'s responses as a whole and giving proper deference to the court's assessment of R.C.F.'s demeanor, we conclude that the court was not clearly erroneous in overruling Hessler's motion to excuse R.C.F.

Reversal cannot be based on challenges to potential jurors who did not become members of the jury, and the court was not clearly wrong when it overruled the motion to excuse R.C.F. We therefore reject Hessler's third assignment of error.

### 4. No Error in Denial of Motion to Change Venue

In his fourth assignment of error, Hessler asserts that the district court erred in denying his request to change venue on the basis that he could not receive a fair trial in Scotts Bluff County. A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007). We conclude that the court did not abuse its discretion when it denied Hessler's request to change venue.

Hessler did not move to change venue prior to jury selection, and he did not offer evidence regarding newspaper stories or other publicity regarding the crime. Instead, his arguments in favor of changing venue were based on voir dire examinations of potential jurors. Hessler noted that a large number of potential jurors had seen or heard reports of the crime and had formed opinions regarding Hessler's guilt. He argues on appeal that the court did not exercise sufficient care during jury selection because the court did not strike various persons for cause and because R.C.F. became a member of the jury. Hessler asserts that jury selection was complicated by the large number of persons who had formed opinions based on news reports, and he notes that many had to be excused based on such opinions. Hessler argues that the jury selection process demonstrated that "local conditions and pretrial publicity made it impossible for [him] to secure a fair and impartial jury in Scotts Bluff County," brief for appellant at 62, and that therefore, he was denied his right to an impartial jury.

In *State v. Quintana*, 261 Neb. 38, 54, 621 N.W.2d 121, 135 (2001), we noted that jurors who had heard publicity about the case "agreed that they could set aside any information that they knew about the case and that they would make decisions solely from what they heard in court." Because the record in *Quintana* showed that an impartial jury had been chosen, we concluded that the defendant had not shown that he could not receive a fair trial in the county at issue and that the court did not abuse its discretion in denying the defendant's motion to change venue.

Similar to *Quintana*, we determine that Hessler has not shown that a change of venue was necessary, because an impartial jury was in fact selected, and that Hessler therefore did not show that he could not receive a fair trial in Scotts Bluff County. As noted above, R.C.F. was the only person actually on the jury of whom Hessler complains on appeal. As we determined above, the record shows that in response to questioning, R.C.F. indicated that he could render an impartial verdict. Hessler makes no other argument that the jury was not impartial; he argues only that it was difficult to select a jury because of alleged partiality in the venire.

Because Hessler has not shown that his actual jury was partial, he has not shown that it was impossible to seat an impartial jury or that he could not receive a fair trial in Scotts Bluff County. We therefore conclude that the court did not abuse its discretion when it denied Hessler's motion for change of venue, and we reject his fourth assignment of error.

### 5. Death Penalty Statutes Not Shown to Be Unconstitutional

In his fifth assignment of error, Hessler asserts that the district court erred when it denied his motions to declare the Nebraska death penalty statutes unconstitutional. The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006). Hessler argues that the death penalty statutes are unconstitutional in various respects. He asserts first that the three statutory aggravating circumstances alleged in this case are unconstitutionally vague and indefinite. The aggravating circumstances alleged in this case were § 29-2523(1)(a), "substantial prior history of serious assaultive or terrorizing criminal activity"; § 29-2523(1)(b), "murder was committed in an effort to conceal the commission of a crime"; and § 29-2523(1)(d), murder that is "especially heinous, atrocious, [and] cruel." Hessler also asserts that the death penalty statutes are unconstitutional with respect to the limited role the statutes give the jury in capital sentencing. He specifically argues that the statutes are unconstitutional in that they fail to allow the jury to consider mitigating circumstances, to assign a weight to aggravating circumstances, and to suggest, recommend, or determine whether a death sentence or a life sentence should be given. Hessler also argues that the statutory requirement that a sentencing panel determines the sentence even when a jury determines aggravating circumstances is an unconstitutional penalty on the defendant's exercise of his or her right to a jury trial in the aggravation phase. As a matter of law, we reject each of Hessler's assertions that the Nebraska death penalty statutes are unconstitutional.

(a) Aggravating Circumstances

With respect to § 29-2523(1)(a), (b), and (d), Hessler asserts that each of these aggravating circumstances is unconstitutionally vague. We note that this court has previously rejected similar challenges regarding each of the aggravating circumstances. Challenges to § 29-2523(1)(a) were rejected in *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); and *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). Challenges to § 29-2523(1)(b) were rejected in *Bjorklund, supra*; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999); and *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves*, 228 Neb. 511, 604 N.W.2d 151 (2000). And challenges to § 29-2523(1)(d) were rejected in *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *Bjorklund, supra*; and *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). Hessler has cited no subsequent federal or state authority that would call such rulings into question, and Hessler has not articulated any persuasive arguments why our prior reasoning is faulty or any other reason why this court should overrule such precedent. We therefore reject Hessler's arguments that the aggravating circumstances set forth in § 29-2523(1)(a), (b), and (d) are unconstitutionally vague and indefinite.

(b) Jury's Role in Capital Sentencing

Hessler's remaining arguments generally deal with the jury's role in capital sentencing. Under Nebraska death penalty sentencing statutes, after the guilt phase of the trial, the jury's only role in sentencing is to find whether aggravating circumstances exist. Pursuant to Neb. Rev. Stat. § 29-2520 (Cum. Supp. 2006), a jury determines whether aggravating circumstances exist unless the defendant waives his or her right to such a jury determination. Pursuant to Neb. Rev. Stat. § 29-2521 (Cum. Supp. 2006), after a jury has found aggravating circumstances or the defendant has waived the right to such jury determination, a panel of three judges determines the sentence, which

determination includes finding mitigating circumstances, balancing aggravating and mitigating circumstances, and conducting a proportionality review.

Hessler asserts that the death penalty statutes are unconstitutional because they do not require the jury to (1) find mitigating circumstances; (2) weigh aggravating and mitigating circumstances; or (3) suggest, recommend, or determine whether a sentence of life or a sentence of death should be imposed. Hessler argues that the statutory scheme is "irrational, unworkable, incoherent, and incapable of rendering a fair and just determination of life and death," brief for appellant at 68, because the sentencing panel, which was not the fact finder during the aggravation phase, is not in as good a position as the jury to assign a weight to the aggravating circumstances, to weigh aggravating circumstances against mitigating circumstances, and to determine the sentence.

In *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003) (*Gales I*), we noted that the U.S. Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), held that there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based. However, we determined in *Gales I* that the holding in *Ring* was not so broad as to require that a jury make additional determinations with regard to capital sentencing. We stated that we did not read *Ring* or other authority "to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury." 265 Neb. at 628-29, 658 N.W.2d at 627. In *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005) (*Gales II*), we again rejected an argument that a jury is required to determine mitigating circumstances and to have input into the appropriate sentence in capital cases. We determined that the defendant in *Gales II* presented no basis to reconsider our decision in *Gales I*, and we noted that later holdings in the U.S. Supreme Court, see *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), only reinforced our prior decision.

Similarly, in the present case, Hessler has cited no authority that would require us to reconsider our decisions in *Gales I* and *Gales II*. While *Ring* requires that a jury find aggravating

circumstances, neither *Ring* nor other authority requires that a jury find mitigating circumstances, weigh aggravating and mitigating circumstances, or have further input into determining the sentence. We are not persuaded by Hessler's arguments, and in the absence of authority, we reject his assertions that a jury must make such determinations.

(c) Exercise of Right to Jury in Aggravation Phase

As a final challenge to the constitutionality of the death penalty statutes, Hessler asserts that the statutory scheme improperly penalizes a defendant's exercise of the right to have a jury find aggravating circumstances. Hessler argues that if a defendant prefers to have the same fact finder determine both the aggravating circumstances and the sentence, the defendant must waive the right to have a jury find aggravating circumstances and instead must allow the sentencing panel to find aggravating circumstances because the statutory scheme does not allow a jury to determine the sentence. Hessler argues that being forced to make such a choice unconstitutionally burdens the defendant's assertion of the right to a jury determination of aggravating circumstances.

Hessler relies on *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), to support this argument. In *Jackson*, the U.S. Supreme Court found unconstitutional a federal statutory provision that authorized the imposition of a death sentence only when a jury recommended the death sentence. Under the statute, if the defendant waived jury trial or pled guilty, the maximum possible sentence the court could impose was a life sentence. The Court determined that the statutory provision was unconstitutional because it improperly coerced or encouraged the defendant to waive his or her Sixth Amendment right to a jury or his or her Fifth Amendment right to plead not guilty and because it needlessly penalized the defendant who asserted such rights.

We do not find Hessler's reliance on *Jackson* applicable or persuasive. Unlike *Jackson*, under the Nebraska death penalty statutes, a defendant cannot avoid the risk of a death penalty by waiving the right to a jury determination of aggravating circumstances; even if the defendant waived such right, the

sentencing panel could still impose a death penalty. Under the statutory provision in *Jackson*, the defendant could completely avoid the death penalty by waiving a jury trial or by pleading guilty. Under the Nebraska statutes, there is no such direct benefit achieved at the expense of waiving the right to a jury as there was in *Jackson*. By waiving the right to a jury under the Nebraska statutes, the sole benefit is that the defendant avoids the circumstance wherein the jury as fact finder finds aggravating circumstances and the judicial panel as fact finder determines the sentence. While the sentencing panel might be more thoroughly versed about the case if it had also found aggravating circumstances, this does not mean that the sentencing panel would necessarily make a sentencing decision that was more favorable to the defendant. Unlike *Jackson*, in which the benefit to waiving the right to a jury was the elimination of exposure to the death penalty, the Nebraska statutory scheme does not provide a clear advantage to a defendant who waives his or her right to have a jury determine aggravating circumstances. The Nebraska statutory scheme does not improperly coerce or encourage a defendant to waive his or her right to a jury and does not penalize a defendant who asserts such right. We reject Hessler's argument that the statutory scheme is unconstitutional pursuant to *Jackson*.

#### (d) Conclusion

Having concluded that each of Hessler's challenges to the constitutionality of Nebraska death penalty statutes is without merit, as a matter of law, we reject Hessler's fifth assignment of error.

### 6. No Error in Refusal of Instruction Requiring Jury to Make Unanimous, Written Findings of Fact in Aggravation Phase

In his sixth assignment of error, Hessler asserts that the court erred when it refused his requested instruction in the aggravation phase of the trial that would have required the jury to unanimously find facts supporting each alleged aggravating circumstance and to set forth such findings in writing. To establish reversible error from a court's refusal to give a requested

instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Blair*, 272 Neb. 951, 726 N.W.2d 185 (2007). We conclude that the court did not err in refusing the instruction, because the instruction did not accurately state the law and Hessler has not shown that he was prejudiced by the refusal to give the instruction.

Hessler requested an instruction to the jury in the aggravation phase which read:

> You, the jury, shall make written findings of fact based upon the trial of guilt and the aggravation hearing, identifying which, if any, of the alleged aggravating circumstances have been proven to exist beyond a reasonable doubt. Each finding of fact with respect to each alleged aggravating circumstance shall be unanimous. If you are unable to reach a unanimous finding of fact with respect to an aggravating circumstance, you must find that the State did not prove the alleged aggravating circumstance.

Hessler argues that the instruction was necessary to avoid the burden on the right to a jury trial found to be unconstitutional in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). Hessler asserts that if the instruction were given, it could ameliorate the negative effects wherein the jury finds aggravating circumstances and the sentencing panel determines the sentences. He argues that when the jury finds aggravating circumstances, the sentencing panel is not adequately familiar with the facts underlying the aggravating circumstances to properly weigh such circumstances. Hessler also notes that if the sentencing panel made findings on aggravating circumstances, the panel would be statutorily required to be unanimous regarding the facts supporting an aggravating circumstance and to set forth such facts in a written order. Hessler argues that the jury should also be required to be unanimous regarding the specific facts that support an aggravating circumstance and that the jury should be required to set forth such facts in writing in order to better inform the sentencing panel's decision.

We note that in the aggravation phase in this case, the court instructed the jury that in order to find that an aggravating circumstance existed, it needed to "unanimously agree beyond a reasonable doubt that an aggravating circumstance is true" and "unanimously decide that the state proved each essential element of an aggravating circumstance beyond a reasonable doubt." Because the court properly instructed the jury that it needed to be unanimous in finding that the State proved the existence of an aggravating circumstance and each element of such circumstance and that the Nebraska death penalty statutes require no more, Hessler has failed to demonstrate any error of law in the instruction given or prejudice from the failure to give the instruction he requested.

Nebraska statutes require that when the right to a jury determination of aggravating circumstances has been waived and the sentencing panel finds aggravating circumstances, the "panel shall make written findings of fact . . . identifying which, if any, of the alleged aggravating circumstances have been proven" and that "[e]ach finding of fact with respect to each alleged aggravating circumstance shall be unanimous." § 29-2521(2). However, when the jury determines aggravating circumstances, the statutes provide only that the jury "shall deliberate and return a verdict as to the existence or nonexistence of each alleged aggravating circumstance," that "[e]ach aggravating circumstance shall be proved beyond a reasonable doubt," and that "[e]ach verdict with respect to each alleged aggravating circumstance shall be unanimous." § 29-2520(4)(f). The statutes do not require a jury to make written findings of fact or to be unanimous regarding the specific facts that support its verdict. The statutes require only that the jury return a verdict as to each alleged aggravating circumstance and that each such verdict be unanimous. The instructions given by the court in this case accurately stated the law, and the instruction requested by Hessler did not accurately state the law.

Hessler's reliance on *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), in connection with this assignment of error is not persuasive. As noted in connection with the previous assignment of error, Hessler asserts that there are inherent disadvantages in the situation where the jury finds

aggravating circumstances and the sentencing panel determines the sentence and that such disadvantages coerce or encourage a defendant to waive his or her right to a jury determination of aggravating circumstances and needlessly penalize defendants who assert such right. Hessler asserts that if the jury were required to make unanimous written findings of fact, it would lessen these perceived disadvantages. As we concluded in connection with the previous assignment of error, the Nebraska statutes are not unconstitutional under *Jackson*. The statutes do not require unanimous written findings of fact, and no such requirement need be imposed in order to save the statutes from being unconstitutional.

Neither *Jackson* nor other authority requires that the jury make unanimous written findings of fact. Because the tendered instruction was not a correct statement of law and because Hessler has shown no prejudice, the court's refusal to give Hessler's requested instruction was not reversible error. We reject Hessler's sixth assignment of error.

### 7. District Court Did Not Err in Granting Hessler's Waiver of Right to Counsel and Allowing Him to Appear Pro Se at Sentencing

Hessler, through appellate counsel, asserts that the district court erred when it granted his pro se motion to waive counsel and allowed him to appear pro se at the sentencing proceeding. He specifically claims that the court erred when it failed to conduct a hearing to determine his competency to waive counsel and when it found that he knowingly, voluntarily, and intelligently waived his right to counsel. On the record before us, we conclude that the court did not err in granting Hessler's motion to waive counsel.

#### (a) Standards for Determining Whether Defendant May Waive Counsel

Hessler cites *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993), and asserts that the inquiry into whether a defendant should be allowed to waive counsel is a two-step process in which the court considers, first, whether the defendant is competent to waive counsel and, second, whether

the defendant has knowingly and voluntarily waived counsel. Hessler argues that the court failed to follow *Godinez* because the court did not sua sponte conduct a competency hearing and did not make an explicit finding that he was competent to waive counsel. He also claims that the Court erred when it determined that his waiver of counsel was made knowingly, voluntarily, and intelligently.

[12] In *Godinez*, the U.S. Supreme Court referred to what it described as a "two-part inquiry," 509 U.S. at 401, into whether a court should accept a defendant's waiver of counsel. The Court indicated that where a defendant seeks to waive counsel, the trial court must be assured that the defendant is competent to do so and that "[i]n addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." 509 U.S. at 400. The two-part inquiry set forth in *Godinez* is therefore, first, a determination that the defendant is competent to waive counsel and, second, a determination that the waiver is knowing and voluntary.

[13] The Court in *Godinez* also stated that the standard for determining whether a defendant is competent to waive counsel is the same as the standard for determining whether a defendant is competent to stand trial. In this regard, the Court stated that the standard for competence is "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" 509 U.S. at 396. See *People v. Halvorsen*, 42 Cal. 4th 379, 165 P.3d 512, 64 Cal. Rptr. 3d 721 (2007) (recognizing *Godinez*' holding that standard for competency to waive trial is same as standard for competency to stand trial where defendant argued that court should have had doubt regarding his competency to stand trial after court concluded he was incapable of representing himself). Finally, in a footnote in *Godinez*, the Court noted:

> We do not mean to suggest, of course, that a court is required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive

> his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence.

509 U.S. at 401 n.13.

In response to Hessler's arguments, the State asserts that the court's inquiry in this case met the requirements set forth in *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001), and that the record supported a finding that Hessler's waiver of counsel was made knowingly, voluntarily, and intelligently. In *Dunster*, we stated, "A defendant may waive the constitutional right to counsel, so long as the waiver is made knowingly, voluntarily, and intelligently." 262 Neb. at 349, 681 N.W.2d at 898. However, we also noted in *Dunster* that before granting the defendant's request to discharge counsel, defense counsel had questioned the defendant's competence to waive counsel and the trial court received evidence relative to the defendant's competence and determined that the defendant was competent. In concluding that the trial court in *Dunster* did not err in granting the request to discharge counsel, we determined that "[t]he record shows that [the defendant] was competent and his request to discharge counsel was made knowingly, intelligently, and voluntarily." 262 Neb. at 355, 681 N.W.2d at 902. Thus, as is apparent in *Dunster*, our jurisprudence is consistent with the two-part inquiry in *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993), which requires both that the trial court be assured that the defendant is competent to waive counsel and that the waiver is made knowingly, voluntarily, and intelligently.

### (b) On the Record Before Us, the District Court Did Not Have Reason to Doubt Hessler's Competence and No Competency Hearing Was Required

Although the analysis of whether a defendant may waive counsel is a two-part inquiry involving competence and waiver, a formal competency determination is not necessary in every case in which a defendant seeks to waive counsel. As noted above, pursuant to footnote 13 in *Godinez*, an explicit competency determination is necessary only when the court has reason to doubt the defendant's competence. Unlike *Dunster*,

*supra*, trial counsel in this case did not move for a competency hearing as a predicate to the court's consideration of Hessler's motion to waive counsel. Limiting our consideration only to the record on appeal, as we must, we determine that the proceedings did not provide reason to doubt Hessler's competence to waive counsel and that the court did not err when a competency hearing was not conducted, nor did it err when it did not make an explicit determination that Hessler was competent to waive counsel.

As noted above, the standard for determining competence is "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" *Godinez*, 509 U.S. at 396. When Hessler filed his motion to waive counsel, he was still represented by counsel, and counsel did not move for a determination of Hessler's competence at that time, compare *Dunster, supra*, and there is no indication in the record on appeal that counsel had earlier challenged Hessler's competence to stand trial. There was no indication throughout pretrial proceedings and the trial itself that Hessler was unable to consult with counsel with a reasonable degree of rational understanding. To the contrary, the record contains references to consultations between Hessler and his counsel, both prior to and during the trial.

With respect to whether Hessler had a rational and factual understanding of the proceedings, we note that the court had observed Hessler over many months prior to trial and at trial, and that although Hessler indicated he was not on medications on the day the court considered his request to waive counsel, the court was in a position to be satisfied that any medication Hessler was or was not on did not compromise his present competence to waive counsel. See *LaHood v. State*, 171 S.W.3d 613 (Tex. App. 2005) (stating, generally, that although defendant was on medication, competency inquiry not mandated where there was no indication of present inability to communicate or understand proceeding). See, also, *U.S. v. Dalman*, 994 F.2d 537 (8th Cir. 1993). We also note that although Hessler's pro se filings, including his motion to waive counsel, contain irrelevant matter, they nevertheless indicate that Hessler understood the

factual nature of the proceedings against him and the potential consequences of such proceedings. Such filings indicate that he had a rational and factual understanding that he was being prosecuted for the death of Heather and that the death penalty was a potential punishment for that crime. See *People v. Halvorsen*, 42 Cal. 4th 379, 403, 165 P.3d 512, 529, 64 Cal. Rptr. 3d 721, 741 (2007) (concluding that although defendant's "'rambling, marginally relevant speeches'" might evidence some form of mental illness, record did not show that defendant lacked understanding of nature of proceedings and that more than "'bizarre actions'" or "'bizarre statements'" were required to raise doubt about competence). On the record before us and under the standard set forth in *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993), we believe that the trial court could reasonably determine that Hessler appeared to have an understanding of the proceedings and that therefore, the court did not have reason to doubt Hessler's competence to waive counsel. Thus, on this record, the court did not err when it did not declare a doubt regarding Hessler's competence and did not conduct a competency hearing, nor did it err when it did not make an explicit competency determination in connection with Hessler's motion to waive counsel.

(c) District Court Did Not Err in Finding Hessler's Waiver of Counsel Was Knowing, Voluntary, and Intelligent

Hessler claims that even if he was competent, his waiver of counsel was not knowing, voluntary, and intelligent. We determine that the court was not clearly erroneous in finding that his waiver of counsel was knowing, voluntary, and intelligent. When a criminal defendant has waived the right to counsel, this court reviews the record to determine whether under the totality of the circumstances, the defendant was sufficiently aware of his or her right to counsel and the possible consequences of his or her decision to forgo the aid of counsel. *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

We note that Hessler was represented by counsel throughout pretrial proceedings and during the guilt and aggravation phases of his trial. In other cases, we have found that the fact that a defendant has had the advice of counsel throughout the

prosecution is an indication that the defendant's waiver of counsel and election to proceed pro se was knowing and voluntary. *Gunther, supra*; *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997). The fact that Hessler was represented at earlier stages indicates that he was aware of his right to counsel and that he knew what he would forgo if he waived counsel.

We also note that the court questioned Hessler extensively regarding his knowledge of his right to counsel and the consequences of waiving counsel. Hessler's answers indicated that he was aware of his right to counsel and that he knew the consequences of waiving such right. The court also questioned Hessler regarding whether his waiver was voluntary, and Hessler's answers indicated that he was not being forced or coerced into waiving counsel. Based on our review of the record, we conclude that under the totality of the circumstances, Hessler was aware of his right to counsel and the consequences of waiving such right and that the court was not clearly erroneous in its determination that Hessler's waiver of counsel was knowing, voluntary, and intelligent.

#### (d) Conclusion

On the record before us, we cannot say that the court erred when it did not sua sponte conduct a competency hearing, and there was no error when the court did not make an explicit determination that Hessler was competent to waive counsel. Further, the court was not clearly erroneous in its determination that Hessler's waiver was knowing, voluntary, and intelligent. We therefore conclude that on this record, the district court did not err in granting Hessler's motion to waive counsel and appear pro se at sentencing. Accordingly, we reject Hessler's seventh assignment of error.

### 8. No Error in Receipt of Records of Guilt and Aggravation Phases of Trial at Sentencing Proceeding

In his final assignment of error, Hessler asserts that the district court erred in the sentencing phase by receiving into evidence the records of the guilt and aggravation phases of the trial and in using such evidence to determine his sentences. Hessler

argues that the sentencing panel's receipt of such evidence was erroneous because it was not authorized by statute. We conclude that the court was authorized to consider such evidence and did not err in admitting it.

[14-16] We have stated that the sentencing phase is separate and apart from the trial phase and that the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). We have also stated that a sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence. *Id.* We have also stated that "the sentencing court, in imposing the death penalty, has . . . the statutory *authority* to consider the trial record." *State v. Ryan*, 248 Neb. 405, 442, 534 N.W.2d 766, 790 (1995). We cited § 29-2521 (Reissue 1995) as the statutory basis for these statements in *Ryan* and *Bjorklund*. The version of § 29-2521 in effect at the time of *Ryan* and *Bjorklund* provided that in the sentencing proceeding, "evidence may be presented as to any matter that the court deems relevant to sentence," including matters relating to aggravating and mitigating circumstances, and that "[a]ny such evidence which the court deems to have probative value may be received." As indicated below, we believe the principles referred to in *Ryan* and *Bjorklund* apply under the current version of Nebraska's death penalty statutes.

In the current version, § 29-2521(2) (Cum. Supp. 2006) addresses sentencing determination proceedings wherein the defendant has waived the right to a jury determination of aggravating circumstances and the sentencing panel decides aggravating circumstances. Section 29-2521(2) contains provisions similar to those quoted above from the prior version. Section 29-2521(3) of the current version addresses sentencing determination proceedings wherein, as in the present case, a jury has found aggravating circumstances and a sentencing

panel determines the sentence. Section 29-2521(3) provides that evidence may be presented as to "any matter that the presiding judge deems relevant to . . . mitigation . . . and . . . sentence excessiveness or disproportionality." The statute further provides that "[a]ny such evidence which the presiding judge deems to have probative value may be received." We determine that the current version of § 29-2521(2) and (3) gives the sentencing panel statutory authority to consider the trial record.

Section 29-2521 gives broad discretion to the presiding judge of the sentencing panel to determine the type of evidence relevant to the sentencing determination. In addition, the death penalty statutes read as a whole make clear that the sentencing panel needs to consider evidence of the crime and of aggravating circumstances in order to properly perform its balancing and proportionality sentencing functions. Under Neb. Rev. Stat. § 29-2522 (Cum. Supp. 2006), the sentencing panel is required to determine whether aggravating circumstances justify imposition of a death sentence, whether mitigating circumstances exceed or approach the weight of aggravating circumstances, and whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases "considering both the crime and the defendant." The records of the guilt and aggravation phases of the trial clearly have probative value regarding these issues. The sentencing panel needs to understand the circumstances of the crime to "consider . . . both the crime and the defendant." *Id.* The record of the guilt phase provides information regarding the circumstances of the crime which aids the sentencing panel in determining whether a death sentence would be excessive or disproportionate, and the record of the aggravation phase assists the sentencing panel in the conduct of its balancing duty. Receipt of the records of the guilt and aggravation phases is authorized under the discretion given the presiding judge under § 29-2521.

We conclude that the court in this case did not err by receiving evidence of the guilt and aggravation phases of the trial in the sentencing hearing. We reject Hessler's final assignment of error.

### 9. Hessler's Sentence Is Proportional to Those in Similar Cases

[17] Finally, we are required to determine whether the death sentence imposed on Hessler is proportional to sentences imposed in similar cases. Pursuant to Neb. Rev. Stat. § 29-2521.03 (Reissue 1995), this court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. Proportionality review under § 29-2521.03 looks only to other cases in which the death penalty has been imposed, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), and requires us to compare the aggravating and mitigating circumstances of this case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in this case is no greater than those imposed in other cases with the same or similar circumstances, *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). See, *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001); *Bjorklund, supra*; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

In the present case, the State alleged, and the jury and sentencing panel found, the existence of three statutory aggravating circumstances: (1) Hessler had a substantial prior history of serious assaultive or terrorizing criminal activity (§ 29-2523(1)(a)); (2) the murder was committed in an effort to conceal the commission of the crimes of the kidnapping and sexual assault of Heather and the sexual assault of another girl, J.B. (§ 29-2523(1)(b)); and (3) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence (§ 29-2523(1)(d)). At sentencing, Hessler offered no evidence other than his "Interlocutory Statement of the Defendant" that would bear on mitigating circumstances, and the sentencing panel concluded that no statutory and no nonstatutory mitigating circumstances were established. The panel also concluded that a death sentence would not be excessive or disproportionate to penalties imposed in similar cases, considering both the crime and the defendant.

We have reviewed our relevant decisions on direct appeal from other cases in which aggravating circumstances were found and the death penalty was imposed by the district court. See, e.g., *Gales, supra* (and cases gathered therein). In considering

proportionality in its sentencing order, the sentencing panel in this case took particular note of the circumstances presented in *Gales, supra*; *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986); *Bjorklund, supra*; and *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979). We also find these cases to be of particular note in considering the proportionality of the sentence in this case. In *Gales*, the defendant was convicted of the first degree murder of a 13-year-old girl he had sexually assaulted, the first degree murder of the girl's 7-year-old brother, and the attempted second degree murder of the children's mother. The defendant in *Gales* was sentenced to death based upon, inter alia, aggravating circumstances under § 29-2523(1)(a), (b), and (d). In *Joubert*, the defendant was convicted of the first degree murders of a 13-year-old boy and a 12-year-old boy, both of whom disappeared during early morning hours, one while delivering newspapers. The defendant in *Joubert* was sentenced to death based upon aggravating circumstances under § 29-2523(1)(a), (b), and (d). In *Bjorklund*, the defendant was convicted of the first degree murder of an 18-year-old girl he had sexually assaulted, and the defendant was sentenced to death based upon aggravating circumstances under § 29-2523(1)(a), (b), and (d). In *Otey*, the defendant was convicted of the first degree murder of a woman he had sexually assaulted, and the defendant was sentenced to death based upon aggravating circumstances under § 29-2523(1)(b) and (d). We further note *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), in which the defendant was convicted of the first degree murders of two women and the sexual assault of another woman and was sentenced to death based upon aggravating circumstances similar to those in the present case. Having reviewed the relevant cases, we find that the imposition of the death sentence in this case is proportional to that in the same or similar circumstances.

## VI. CONCLUSION

Having rejected each of Hessler's assignments of error and having found that the death sentence imposed in this case is proportional, we affirm Hessler's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., not participating.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEE, V. PAULA WEEKLEY, APPELLANT.
741 N.W.2d 658

Filed November 30, 2007. No. S-06-292.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. **Administrative Law: Jurisdiction: Appeal and Error.** Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.
4. **Administrative Law: Jurisdiction.** "The county where the action is taken" within the meaning of Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999) is the site of the first adjudicated hearing of a disputed claim.

Appeal from the District Court for Dodge County: JOHN E. SAMSON, Judge. Vacated and remanded with directions to dismiss.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, for appellant.

Jon Bruning, Attorney General, and Frederick J. Coffman for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Paula Weekley, a former employee of the Nebraska Department of Health and Human Services (DHHS), appeals from the order of the district court for Dodge County affirming DHHS' decision to terminate her employment. On appeal, Weekley argues that pursuant to Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999), the district court for Dodge County did not have jurisdiction over this appeal. We conclude that DHHS' petition was not filed in compliance with § 84-917(2)(a), and as a result, the district court for Dodge County did not have jurisdiction.

## FACTS

Weekley was a protection and safety worker for DHHS and was assigned to perform case work for Adult Protective Services (APS). APS workers assist elderly and vulnerable adults in potentially neglectful or abusive settings and serve as resources for citizens who need assistance in caring for elderly and vulnerable adults.

On Friday, September 6, 2002, APS received a telephone call from a nurse at the Fremont Area Medical Center who was concerned about the care an elderly woman was receiving at the woman's home. On September 9, the case was assigned to Weekley. Weekley was on annual leave at the time, but returned to her office on Tuesday, September 10.

Upon returning to work on September 10, 2002, Weekley reviewed her telephone messages, intake forms, and other documents that had accumulated on her desk during her absence. Among the documents she reviewed was the intake report pertaining to the elderly woman. Under DHHS regulations, Weekley was to make face-to-face contact with the subject of the report within 5 days. But Weekley was unable to locate her and never made face-to-face contact. On September 23, a fire broke out at the elderly woman's home, resulting in her death.

On October 21, 2002, Weekley received a "Written Notice of Allegations," relating to the handling of the case and informing Weekley that if the allegations were substantiated, she would be subject to disciplinary action. On January 2, 2003, the protection and safety administrator issued a "Written Notice of Discipline" terminating Weekley's employment. The protection and safety administrator testified that the decision was based on the current information related to the handling of the elderly woman's case and Weekley's previous conduct that had resulted in disciplinary actions. Weekley filed a grievance with DHHS. The agency director reviewed Weekley's case and affirmed the protection and safety administrator's decision to terminate Weekley's employment.

Weekley appealed the agency director's decision through the administrator of the Department of Administrative Services (DAS). Pursuant to the grievance procedures in Weekley's labor contract, a "mini hearing" was held before the designee

of the employee relations administrator of the DAS in Lincoln, Lancaster County, Nebraska. The relevant provisions of the labor contract relating to the "mini hearing" process are as follows:

> 4.10.2 **MINI HEARING PROCESS**. When an appeal has been submitted to the Administrator of the DAS Employee Relations Division, and before a hearing officer/arbitrator is appointed, the Administrator of the DAS Employee Relations Division or his/her designee may confer with the Union representative, or grievant, if the grievant chooses not to be represented by [the Nebraska Association of Public Employees/American Federation of State, County and Municipal Employees] or any other representative, and the Agency representative to discuss and attempt to informally resolve the grievance. In cases where the grievant is not represented by the union, a union representative may attend the hearing and observe. . . . This conference (mini-hearing) shall be informal and the rules of evidence shall not apply. All exhibits that the Agency or Grievant want the Administrator of the DAS Employee Relations Division/Designee to consider must be received by the DAS Employee Relations Division and the opposing party a minimum of three days before the mini-hearing. . . . Neither party may be represented by anyone licensed (active or inactive) to practice law in the State of Nebraska at this conference.
>
> 4.10.3 The Administrator of the DAS Employee Relations Division or his/her designee may request a conference with the parties to discuss resolution of the grievance and shall have the authority to interview witnesses or require documents and other items to be produced prior to the conference. . . . However, the intent of the parties is that the matter be considered at this step in an informal manner and be resolved as expeditiously as possible.
>
> 4.10.4 After the conference and a review of the grievance and other documents submitted by the parties, the Administrator of the DAS Employee Relations Division or his/her designee shall issue a written decision to the parties to reverse, modify or uphold the answer made by the Agency Head at Step 2. This decision shall be issued

> within 20 workdays of the conference and shall include a description of the events giving rise to the grievance and the rationale upon which the decision is made. If a written decision is not rendered within 20 workdays, either party may request the grievance be heard before the hearing officer/arbitrator, as appropriate. This decision shall not constitute a part of the appeal record if the matter is heard by an arbitrator or a hearing officer.
>
> 4.10.5 If either party is not satisfied with the decision made by the Administrator of the DAS Employee Relations Division or his/her designee, that party shall give notice that the appeal be heard by a hearing officer/arbitrator . . . by filing a notice with the Administrator of the DAS Employee Relations Division in the office of the Employee Relations Division within 7 workdays of receipt of the decision from the Administrator of the DAS Employee Relations Division or his/her designee.
>
> 4.10.6 If notice is not received within the prescribed time frames, the decision of the Administrator of the DAS Employee Relations Division or his/her designee shall be considered final.

In accordance with these provisions, the appointed designee of the DAS employee relations administrator conducted the "mini hearing" in Lancaster County. At the "mini hearing," each party called one witness, submitted exhibits, and presented oral arguments. Following the "mini hearing," the appointed designee issued a written decision setting forth findings of fact, conclusions of law, and affirming DHHS' decision to terminate Weekley's employment.

Weekley appealed this decision to the State Personnel Board. A hearing officer was appointed, and a hearing was conducted in Dodge County, Nebraska. At the hearing, both parties were given the opportunity to present new or different testimony and exhibits, examine and cross-examine witnesses, and offer argument in support of their position. Following the hearing, the hearing officer made findings of fact, conclusions of law, and a recommendation. For his recommendation, the hearing officer explained that "[i]f the Board concludes that the fact that [the elderly woman] died overrides all other considerations, the

Board should dismiss [Weekley] and uphold the discipline." The hearing officer further recommended, however, that "[i]f the Board concludes that [Weekley] can be a competent performer for [DHHS] if demoted to a position requiring less independent judgement and with more day-to-day supervision, the Board should reject [DHHS'] discipline and sustain the Grievance."

The State Personnel Board adopted the hearing officer's findings of fact and conclusions of law, but concluded that the hearing officer's recommendation was insufficient. The State Personnel Board concluded that Weekley "was guilty of the conduct alleged, but the discipline imposed was not warranted based on the evidence presented." The board then remanded the matter to DHHS for further action.

DHHS appealed the State Personnel Board's decision by filing a petition for review in the Dodge County District Court. In her answer, Weekley asserted that the Dodge County District Court did not have jurisdiction because DHHS' petition for further review was not filed "in the district court of the county where the action is taken," as required by § 84-917. The district court rejected Weekley's argument and concluded that DHHS' petition for further review was properly filed in the Dodge County District Court.

The district court further concluded that DHHS had "met its burden of proof that its decision to terminate [Weekley's employment] was made in good faith and for just cause, given the nature and severity of the infraction and in consideration with the history of discipline and performance contained in the employee's personnel file." Accordingly, the court reinstated DHHS' decision to terminate Weekley's employment. Weekley appealed.

## ASSIGNMENTS OF ERROR

Weekley assigns that the district court erred in finding (1) that it had jurisdiction to hear this case because the court erroneously concluded that the "mini hearing" was not the first adjudicated hearing, (2) that DHHS had just cause for disciplining Weekley, and (3) that DHHS' decision to terminate Weekley's employment was made in good faith and for cause.

## STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[1]

## ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.[2] Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.[3]

[4] The jurisdictional requirements for obtaining judicial review of a final administrative decision under the Administrative Procedure Act are set forth in § 84-917(2)(a). This section provides, in relevant part, that "[p]roceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency."[4] We have repeatedly interpreted the phrase "'county where the action is taken'" to mean "'"the site of the first adjudicated hearing of a disputed claim."'"[5]

Weekley argues that the "mini hearing" held in Lancaster County was the first adjudicated hearing and that therefore, under § 84-917(2)(a), DHHS' petition for further review should have been filed in the district court for Lancaster County. Weekley contends that DHHS incorrectly filed its petition for further

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[1] *Zitterkopf v. Maldonado*, 273 Neb. 145, 727 N.W.2d 696 (2007).

[2] *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

[3] *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 562 N.W.2d 355 (1997).

[4] § 84-917(2)(a).

[5] *Reiter v. Wimes*, 263 Neb. 277, 281, 640 N.W.2d 19, 23 (2002). Accord, *Essman v. Nebraska Law Enforcement Training Ctr., supra* note 3; *Metro Renovation v. State Dept. of Labor*, 249 Neb. 337, 543 N.W.2d 715 (1996), *disapproved on other grounds, State v. Nelson, ante* p. 304, 739 N.W.2d 199 (2007).

review in Dodge County, and as a result, the district court for Dodge County did not have jurisdiction over this appeal.

DHHS argues that its petition for further review was properly filed in the district court for Dodge County because the "mini hearing" held in Lancaster County did not constitute an adjudicated hearing. In support of this argument, DHHS points to the procedures governing the grievance process—in particular, the informal nature in which "mini hearings" are conducted. DHHS notes that in a "mini hearing," the rules of evidence do not apply, neither party may be represented by anyone licensed to practice law, and the written decision issued at the conclusion of the "mini hearing" does not become a part of the appeal record.

Notwithstanding the procedural limitations and the informal nature of the "mini hearing," we are not persuaded by DHHS' argument that the "mini hearing" was not an adjudicated hearing. Neither § 84-917(2)(a) nor any of our previous decisions addressing this issue require that to qualify as the first adjudicated hearing, the hearing must apply the formal rules of evidence, allow representation of counsel, or create a transcript that is part of the record on appeal. Instead, given the record before us, we conclude that the "mini hearing" in Lancaster County was the first adjudicated hearing.

In so finding, we note that the procedures governing the "mini hearing" in this case are very similar to those used in small claims court. Proceedings in small claims court are conducted on a very informal basis with a minimum of procedural requirements.[6] Parties are not represented by counsel[7]; matters are tried without a jury[8]; the "hearing and disposition of all matters shall be informal"[9]; the formal rules of evidence do not apply[10]; and,

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[6] *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002); *Harris v. Eberhardt*, 215 Neb. 240, 338 N.W.2d 53 (1983).

[7] Neb. Rev. Stat. § 25-2803(2) (Reissue 1995).

[8] Neb. Rev. Stat. § 25-2805 (Cum. Supp. 2006).

[9] Neb. Rev. Stat. § 25-2806 (Reissue 1995).

[10] *Id.*

on appeal, all cases are tried by the district court de novo.[11] Yet, in spite of the informal nature of these proceedings, we would not say that a decision issued by a small claims court is anything less than an adjudication. The decision of the small claims court is a "judgment," and when the time for appeal has run, the prevailing party can obtain execution on that judgment as in any other case in county court.[12] Likewise, we cannot say that the "mini hearing" in the present case, which shares much of the same procedural informality, is anything other than an adjudication.

Here, the "mini hearing" was held in the presence of the appointed designee who sat as a decisionmaker. Prior to the "mini hearing," both DHHS and Weekley were given the opportunity to submit exhibits and briefs to the appointed designee. And at the "mini hearing," the parties were allowed to present witnesses, offer exhibits, and present oral arguments. Moreover, following the "mini hearing," the appointed designee issued a written decision that, if not appealed, would have become the final and binding decision. In other words, an agency-appointed decisionmaker issued a ruling based on evidentiary submissions, that in the absence of an appeal, would have been a legally binding determination of the dispute. A hearing was held, however informal, and the appointed designee adjudicated the dispute based on that hearing.

DHHS also claims that the decision rendered by the appointed designee following the "mini hearing" was not an "'adjudication,'" because it was not "'the determination *by the highest or ultimate authority* of an agency.'"[13] DHHS asserts that the highest authority in this case was the State Personnel Board hearing officer who was appointed, conducted a hearing in Dodge County, and issued a decision.

We rejected a similar argument in *Essman v. Nebraska Law Enforcement Training Ctr.*[14] In *Essman*, we were urged to create

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[11] Neb. Rev. Stat. § 25-2734 (Reissue 1995).

[12] § 25-2806.

[13] Brief for appellee at 21-22.

[14] *Essman v. Nebraska Law Enforcement Training Ctr.*, *supra* note 3.

an exception to the "first adjudicated hearing" rule by holding that "where the agency conducts a subsequent hearing and has the power to receive additional evidence before issuing its final order, the site of the last hearing should be 'the county where the action is taken' for purposes of § 84-917(2)(a)."[15] We declined to create such an exception. We explained that our construction of the statute "provides a party with a clear statement of where to file a petition seeking judicial review of an administrative action," and there is "no reason to complicate compliance with the rule by grafting unnecessary exceptions upon it."[16]

As in *Essman*, we conclude here that conducting a subsequent hearing, where new or additional evidence may be received, does not change the character of the *first* adjudicated hearing. And in the present case, for the reasons explained above, the *first* adjudicated hearing was in Lancaster County. Therefore, we agree with Weekley that the Dodge County District Court lacked jurisdiction to overrule the State Personnel Board and affirm DHHS' termination of Weekley's employment. Having so determined, we need not consider Weekley's remaining assignments of error.

We recognize that DHHS, unfortunately, faced a difficult choice in deciding where to prosecute its appeal. And parties should not be discouraged from pursuing alternative means of resolving their disputes. However, confusion could have been avoided in this case had the labor contract been drafted to more expressly elect between mediation and a binding hearing on the merits. Nonetheless, the negotiated contract set the rules and we are called upon to judge the proceedings accordingly.

## CONCLUSION

We conclude that the "mini hearing" held in Lancaster County was the first adjudicated hearing. As such, pursuant to § 84-917(2)(a), DHHS was required to file its petition for further review in the district court for Lancaster County. But DHHS filed its petition for further review in Dodge County, rather than Lancaster County, and the Dodge County District Court did not

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[15] *Id.* at 351, 562 N.W.2d at 358.

[16] *Id.* at 351-52, 562 N.W.2d at 358.

have jurisdiction. The judgment of the district court is vacated, and the cause is remanded with directions to dismiss DHHS' petition for review.

VACATED AND REMANDED WITH DIRECTIONS TO DISMISS.

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# IN RE TRUST CREATED BY LAVOHN C. ISVIK, DECEASED. SECURITY NATIONAL BANK, TRUSTEE OF THE LAVOHN C. ISVIK REVOCABLE TRUST, APPELLEE, AND IOWA STATE UNIVERSITY FOUNDATION ET AL., INTERESTED PARTIES, APPELLEES, V. MARY ELLEN RICKERT AND LAVOHN C. STINE, APPELLANTS.

741 N.W.2d 638

Filed November 30, 2007. No. S-06-420.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Trusts: Equity: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.
4. **Equity: Reformation.** A proceeding to reform a written instrument is an equity action.
5. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
6. **Statutes.** Statutory interpretation presents a question of law.
7. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
8. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
9. **Statutes: Presumptions: Words and Phrases.** Generally, when the word "may" is used in a statute, permissive or discretionary action is presumed.
10. **Trusts.** A document by which a settlor purports to revoke a revocable trust is a term of that trust within the meaning of Neb. Rev. Stat. § 30-3841 (Cum. Supp. 2006).
11. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

12. **Evidence: Proof.** Evidence may be clear and convincing despite the fact that other evidence may contradict it.

Appeal from the County Court for Douglas County: JEFFREY MARCUZZO, Judge. Reversed and remanded with directions.

William J. Lindsay, Jr., and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellants.

Richard J. Gilloon and Bradley B. Mallberg, of Erickson & Sederstrom, P.C., for appellee Security National Bank.

David S. Houghton and J.P. Sam King, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellees Iowa State University Foundation et al.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

LaVohn C. Isvik, as settlor of the LaVohn C. Isvik Revocable Trust, wrote a letter to the trustee stating that she was revoking the trust and requesting that all holdings of the trust be conveyed to her. Approximately 2 weeks later, she died unexpectedly. In trust administration proceedings commenced by the trustee following her death, the county court for Douglas County concluded that Isvik did not intend to revoke the trust, but only to discharge the trustee. The issue presented in this appeal is whether the court erred in reforming the revocation letter to conform to what it perceived to be Isvik's true intent. In resolving this issue, we must decide whether the county court also erred in relying upon extrinsic evidence of intent.

## I. BACKGROUND

Under the terms of the original trust created by Isvik in 1995, she was the sole trustee and her two daughters, Mary Ellen Rickert and LaVohn C. Stine, the appellants herein, were contingent death beneficiaries. Isvik reserved the right "[t]o amend or revoke this agreement, in whole or in part, by written instrument filed with my trustee . . . ."

In 2003, Isvik amended the trust instrument by naming George E. Nelson as cotrustee. After her husband died later that year, Isvik again amended the trust instrument to add beneficiaries and alter trust property distributions. Under the terms of the second amendment, the appellants were named the beneficiaries, upon Isvik's death, of certain real estate located in Douglas County, Nebraska. The amendment also added Iowa State University Foundation; Delta Tau Delta Scholarship Foundation, Inc.; Sigma Kappa Foundation, Inc.; Klemme United Methodist Church; and Trinity Lutheran Church (collectively the charities) as beneficiaries of the remainder of the trust assets.

Sometime thereafter, Isvik became dissatisfied with Nelson's performance as cotrustee. In December 2004, she sent a letter to Nelson, removing him as cotrustee and naming Security National Bank (the Bank) as successor trustee. The letter was drafted by Isvik's attorney William Lynch and signed by Isvik. In February 2005, Isvik executed a third amendment to the trust in which she appointed the Bank as sole trustee.

Isvik subsequently became dissatisfied with the Bank's performance in this capacity. In July 2005, she and Rickert met with Douglas Oldaker and James Kerkhove of the Bank's trust department. Although Oldaker was not present for the beginning of the meeting, Rickert testified that Isvik "shook . . . Kerkhove's hand . . . wished him a good day [and] said 'I'm revoking my trust.'" However, Oldaker and Kerkhove both testified that their impression from the meeting was that Isvik was only interested in removing the Bank as trustee. Oldaker asked Isvik to give the Bank 30 more days in which to address her concerns and improve its service. With Rickert's concurrence, Isvik agreed to Oldaker's proposal.

Still displeased with the Bank, Isvik composed a letter to Oldaker. Because of her impaired vision, Isvik dictated the letter to her personal assistant, Ruth Capps, who typed it. The letter, signed by Isvik and received by the Bank on August 26, 2005, stated in part: "I am revoking my Trust as of this date. Consider this my notice to you[.] Make no further transactions with any of my holdings and convey all materials pertaining to and including my holdings to me immediately." Rickert testified that she had a

telephone conversation with Isvik on August 25. She stated that Isvik had indicated that she had just sent a letter to the Bank revoking her trust and that she felt "'relieved.'"

Oldaker testified that when he received this letter on August 26, 2005, he called Isvik to inquire about her intent. Oldaker testified that, based on his legal training, he was concerned about her use of the term "revoking" and that he wanted to clarify that she actually intended to revoke the trust and thus alter the dispositive provisions of her estate. He reminded her that "by revoking the trust, it would throw the trust assets into probate." Oldaker testified that after this discussion with Isvik, he concluded that she wanted to act as her own trustee and did not want her trust assets to pass through probate. Oldaker stated that the Bank proceeded as if the trust had not been revoked.

Lynch testified that he also received a copy of the letter. On or about August 29, 2005, Lynch called Isvik "to find out why she sent the letter and what was going on." Lynch stated that his initial impression from Isvik was that she wanted to revoke the trust. However, after some discussion about the effects of revocation, Lynch concluded that Isvik only wanted to remove the Bank as trustee and did not want to revoke the trust. Lynch testified that he and Isvik agreed that he would prepare legal documents necessary to name new trustees of her trust.

Isvik was scheduled to meet with Lynch on September 7, 2005, to sign the new trust documents. On September 4, she died from injuries sustained in a fall 2 days earlier. As a result, Isvik never reviewed or signed the new trust documents.

After Isvik's death, the Bank filed a trust registration statement and a petition for trust administration with the county court for Douglas County pursuant to Neb. Rev. Stat. §§ 30-3812 to 30-3820 (Cum. Supp. 2006). The Bank sought "an order declaring whether the Trust was revoked by the August 26, 2005 letter or should be reformed to effect a change in trustee only." The appellants moved to dismiss the petition and strike the trust registration statement. Subsequently, the charities entered an appearance as interested parties.

The county court conducted a consolidated evidentiary hearing on the Bank's petition and the appellants' motion to dismiss. The unsigned documents prepared by Lynch were received in

evidence over the appellants' objection. Subsequently, the court entered an order in which it found by clear and convincing evidence that Isvik's use of the term "revoke" in her August 2005 letter "was a mistake and was only an attempt to change the trustee and not to terminate the trust itself." The court further determined that because the letter did not revoke the trust and no formal change of the trustee was made prior to Isvik's death, the Bank remained the trustee. The court directed the Bank to carry out the terms and administer the trust pursuant to Neb. Rev. Stat. § 30-3866 (Cum. Supp. 2006), and denied the appellants' motion to dismiss and motion to strike.

Following the entry of the county court's order, the appellants filed a motion requesting that no supersedeas bond or undertaking be required in order to pursue an appeal. The court entered an order on April 7, 2006, in which it required a supersedeas bond or undertaking in the amount of $50,000. On April 10, the appellants timely filed their notice of appeal and deposited the appropriate docketing fees and cost bond. On the same day, the appellants filed a "Bond Commitment" in the county court which professed their diligence in attempting to obtain a supersedeas bond. Attached to the bond commitment was a letter from a surety company stating that it would issue the bond upon receipt of an irrevocable letter of credit. On April 25, the appellants filed a $50,000 supersedeas bond with the clerk of the county court.

After this appeal was docketed in the Nebraska Court of Appeals, the Bank, joined by the charities, filed a motion to dismiss on grounds that the appellants failed to file a supersedeas bond or undertaking within 30 days of the county court's final order, as required by Neb. Rev. Stat. § 30-1601(3) (Cum. Supp. 2006). The Court of Appeals overruled the motion but ordered the parties to submit supplemental briefs on the issue, which they did. Subsequently, we moved the appeal to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

## II. ASSIGNMENTS OF ERROR

The appellants assign, restated, consolidated, and reordered, that the county court erred in (1) considering extrinsic evidence

of Isvik's intent in the trust revocation letter, (2) receiving exhibit 10, (3) finding that Isvik's trust revocation letter was a mistake, (4) reforming the terms of Isvik's trust revocation letter without clear and convincing evidence of a contrary intent, and (5) finding that the Bank was the trustee on the date of Isvik's death.

## III. STANDARD OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.[1] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

[3-5] Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.[3] A proceeding to reform a written instrument is an equity action.[4] Accordingly, we review the reformation issues in this trust administration proceeding de novo on the record. In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.[5]

[6,7] Statutory interpretation presents a question of law.[6] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[7]

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[1] *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

[2] *Id.*

[3] *Id.*; *In re R.B. Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 661 N.W.2d 307 (2003).

[4] *Haines v. Mensen*, 233 Neb. 543, 446 N.W.2d 716 (1989); *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986); *Hohneke v. Ferguson*, 196 Neb. 505, 244 N.W.2d 70 (1976).

[5] *Shearer v. Shearer*, 270 Neb. 178, 700 N.W.2d 580 (2005).

[6] *Rohde v. City of Ogallala*, 273 Neb. 689, 731 N.W.2d 898 (2007).

[7] *Id.*

[8] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.[8]

## IV. ANALYSIS

### 1. Applicability of Nebraska Uniform Trust Code

The revocable trust which is the subject of this proceeding was created in 1995. The Nebraska Uniform Trust Code (NUTC), Neb. Rev. Stat. §§ 30-3801 to 30-38,110 (Cum. Supp. 2006), was enacted in 2003 and became operative on January 1, 2005. Except as otherwise provided in the NUTC, it applies "to all trusts created before, on, or after January 1, 2005" and "to all judicial proceedings concerning trusts commenced on or after January 1, 2005."[9] This trust administration proceeding was commenced on September 22, 2005. We have noted that the NUTC is generally applicable to all trusts in existence on January 1, 2005, subject to certain statutory and perhaps constitutional exceptions.[10] Here, the parties have directed us to no exception to the applicability of the NUTC to the preexisting trust, and we have found none. Accordingly, we conclude that the NUTC applies to this proceeding.

### 2. Supersedeas Bond

As noted, the appellees' motion for summary dismissal was overruled but the parties were ordered to file supplemental briefs on the issue of whether the appeal should be dismissed because a supersedeas bond was not filed within 30 days of the order from which the appeal was taken. We address this threshold issue.

[9] Appellate review under the NUTC is governed by § 30-1601(3), which provides in pertinent part:

> When the appeal is by someone other than a personal representative, conservator, trustee, guardian, or guardian

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[8] *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

[9] § 30-38,110(a)(1) and (2).

[10] *In re Trust Created By Inman*, 269 Neb. 376, 693 N.W.2d 514 (2005). See, also, John M. Gradwohl & William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 Neb. L. Rev. 312 (2003).

> ad litem, the appealing party shall, within thirty days after the entry of the judgment or final order complained of, deposit with the clerk of the county court a supersedeas bond or undertaking in such sum as the court shall direct . . . conditioned that the appellant will satisfy any judgment and costs that may be adjudged against him or her . . . unless the court directs that no bond or undertaking need be deposited. If an appellant fails to comply with this subsection, the Court of Appeals on motion and notice may take such action, including dismissal of the appeal, as is just.

We view the authority to dismiss an appeal conferred by this statute as discretionary in nature, in that it directs that a court "may" take such action as is just. Generally, when the word "may" is used in a statute, "permissive or discretionary action is presumed."[11] Here, the record reflects that the appellants had initiated but not completed efforts to obtain a supersedeas bond within the 30-day period. The bond was actually filed 46 days after the entry of judgment. There is no indication that the late filing resulted in prejudice or delay. We conclude that dismissal would not be just under these circumstances.

### 3. Reformation

Isvik's final letter to the Bank is unambiguous. In the letter, she clearly and unequivocally stated, "I am revoking my Trust as of this date[,]" and she directed the Bank to convey all trust holdings and materials to her. In reforming this document, the county court relied upon the following provision of the NUTC:

> The court may reform the terms of a trust, *even if unambiguous*, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.[12]

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[11] Neb. Rev. Stat. § 49-802(1) (Reissue 2004).

[12] § 30-3841 (emphasis supplied).

In order to resolve the questions presented in this appeal, we must initially decide whether Isvik's letter is subject to reformation under this provision. If so, we must determine whether extrinsic evidence as to Isvik's intent can be considered and, finally, whether there is clear and convincing evidence that Isvik's true intent at the time she signed and mailed the letter was to discharge the Bank as trustee but keep the trust in existence.

### (a) Was Letter "Term of a Trust" Subject to Reformation Under § 30-3841?

[10] The NUTC defines the phrase "terms of a trust" as "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding."[13] Here, the trust instrument reflects the reserved power of the settlor, during her lifetime, "[t]o amend and revoke this agreement, in whole or in part, by written instrument filed with [the] trustee . . . ." This reserved power contemplates and indeed requires that the manifestation of a settlor's intent to revoke the trust must appear in a subsequently executed and delivered document which is distinct from the trust instrument itself. We conclude that a document by which a settlor purports to revoke a revocable trust is a term of that trust within the meaning of § 30-3841.

### (b) May Court Consider Extrinsic Evidence Regarding Settlor's Intent in Determining Whether Terms of Trust Were Affected by Mistake of Fact or Law and Thus Subject to Reformation Under § 30-3841?

The appellants argue that because Isvik's intent to revoke the trust was unambiguously stated in her letter to the Bank, the county court erred in receiving extrinsic evidence of a contrary intent. They rely upon *In re Trust Created by Cease*,[14] in which

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[13] § 30-3803(19).

[14] *In re Trust Created by Cease*, 267 Neb. 753, 756, 677 N.W.2d 495, 498 (2004).

we held that parol evidence of intent should not have been admitted with respect to a document executed by the settlor of a revocable trust who was also its trustee, stating that he was resigning as trustee and that such resignation was "'intended to terminate said trust.'" We held that the document was unambiguous and operated to terminate the trust as a matter of law upon its execution.

*In re Trust Created by Cease* was decided before the NUTC became effective and did not involve the issue of reformation based upon mistake. Accordingly, it is not controlling on the precise issue presented here. Nor is this a case in which a party seeks to alter, vary, or contradict the terms of a written contract by proof of a prior or contemporaneous oral agreement, which would be prohibited by the parol evidence rule.[15] The parties have not directed us to any pre-NUTC Nebraska case law addressing the admissibility of extrinsic evidence of intent in an action to reform a trust instrument or related document, and this is our first occasion to consider the issue under the NUTC.

Section 30-3841 is taken verbatim from § 415 of the Uniform Trust Code. The comment to that section draws a distinction between reformation and resolution of an ambiguity:

> Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, *reliance on extrinsic evidence is essential.* To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required.[16]

The NUTC specifically provides that it is supplemented by the "common law of trusts and principles of equity" except to

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[15] See *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004).

[16] Unif. Trust Code § 415, 7C U.L.A. 514, comment at 515 (2006) (emphasis supplied).

the extent modified by the code or another statute.[17] In equitable actions to reform other types of written instruments, we have held that extrinsic evidence is admissible to prove mistake and actual intent. For example, in an action involving reformation of an insurance policy, we noted that the "power of a court to correct a mutual mistake implies the admissibility of competent and necessary proof of such mistake."[18] We have held that the parol evidence rule does not apply in an action seeking reformation of a contract on grounds of mistake and fraud, because such evidence is necessary to a determination of the antecedent agreement between the parties.[19] In such cases, "the evidence . . . is mainly or wholly oral" because "[i]n order to prove the mistake it is indispensable to show by parol in what particulars the writing differs from the oral agreement."[20] Thus, we have held extrinsic evidence to be admissible in actions seeking reformation of deeds,[21] promissory notes,[22] and insurance policies.[23]

Here, Isvik unambiguously informed the Bank that she was revoking her trust. The county court was not asked to interpret her words, but, rather, to determine whether she wrote them in a mistaken attempt to achieve the different objective of leaving the trust in place but discharging the Bank as trustee. Based upon the comment to § 415 of the Uniform Trust Code and our consistent prior holdings that extrinsic evidence of intent is admissible in equitable actions for reformation of written instruments, we conclude that the county court did not err in receiving extrinsic evidence on the issue of Isvik's intent. We consider that evidence in our de novo review.

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[17] § 30-3806.

[18] *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n.*, 106 Neb. 80, 84, 182 N.W. 582, 584 (1921).

[19] *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984).

[20] *Story v. Gammell*, 68 Neb. 709, 712, 94 N.W. 982, 983 (1903).

[21] *Johnson v. Stover, supra* note 19.

[22] *Lincoln Equipment Co. v. Eveland*, 173 Neb. 174, 112 N.W.2d 755 (1962).

[23] *Fadden v. Sun Ins. Office*, 124 Neb. 712, 248 N.W. 62 (1933).

### (c) Is There Clear and Convincing Evidence That Isvik's Intent When She Signed and Mailed Her Letter to Bank Was Not to Revoke Trust, but, Rather, to Discharge Bank as Trustee?

The parties do not question Isvik's competency at the time she signed and mailed the letter. Isvik was a college graduate, was in good health, and appeared mentally alert and capable of handling her own affairs. Although her vision was impaired, she was able to read legal documents with the assistance of a mechanical device.

The evidence of Isvik's intent when she signed and mailed the letter to the Bank is primarily circumstantial and supports conflicting inferences. There is evidence to support a reasonable inference that Isvik intended to discharge the Bank as trustee but not revoke her trust. Several witnesses testified that Isvik was dissatisfied with the Bank's performance as trustee. Rickert testified that Isvik was upset with the Bank for not redistributing the assets between her trust and her husband's trust. She also indicated that Isvik was disturbed by the Bank's suggestion that she use her Social Security benefits for living expenses. Capps stated that Isvik was upset with the manner in which the Bank was handling distributions from her trust. Oldaker admitted that at their July 2005 meeting, Isvik expressed dissatisfaction with how the Bank was distributing money.

Lynch, as Isvik's attorney, had been aware of her dissatisfaction with the Bank's performance. When he received a copy of her letter, he called her to discuss her intent and determine his future role. From her response, he formed an initial impression that she intended to revoke the trust. However, after further discussion, he concluded that she intended to remove the Bank as trustee but not revoke the trust. In a similar vein, Oldaker testified that when he spoke with Isvik on the telephone after receiving her letter, he concluded that she wished to serve as her own trustee but not revoke her trust. He stated that Isvik indicated she did not want her estate to pass through probate.

Evidence of Isvik's fondness for the charities designated as trust beneficiaries also supports an inference that she did not intend to revoke the trust. Capps testified that Isvik had spoken

highly of the charities and stated that she wanted them to eventually receive the trust assets. Isvik's attorney testified that the documents he prepared after his telephone conversation with Isvik made no changes in the trust beneficiaries.

But there is also evidence supporting an inference that Isvik intended precisely what she said in her letter to the Bank. Isvik had previously signed documents prepared by her attorney which changed the designation of her trustee. None of these documents utilized language indicating revocation of the trust. Rickert testified that during a conversation with Isvik in July 2005, Isvik stated that she disliked having someone else owning her house and that she had said, "'I don't want the trust. I don't know why I need a trust. I can't see the point of the trust.'" Rickert also testified that when she accompanied Isvik to the Bank to meet with trust officers in July, Isvik expressed to Rickert, prior to the meeting, her desire to revoke the trust, but then agreed to allow the Bank more time to improve its performance. Rickert also testified that during a telephone conversation on August 25, Isvik stated that she had sent a letter to the Bank revoking her trust and that she felt "'relieved.'"

Capps testified that Isvik had discussed revoking her trust and that she believed she needed to do so in order to manage her own money. There is also evidence that Isvik understood that she could create a new trust after revoking the existing one. Capps testified that LaVohn was considering a new trust "to be used after [her] death or in [an] emergency."

As noted above, the testimony of Lynch regarding his telephone conversation with her following receipt of a copy of her letter to the Bank could support an inference of mistake. But the testimony could also be understood to mean that Isvik actually intended to revoke the trust at the time she signed and mailed the letter, but then changed her mind after discussing the matter with Lynch. Such a "post-execution change of mind" would not afford a basis for reformation.[24]

[11,12] Because our review is de novo, we must reach an independent conclusion as to whether there is clear and

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[24] Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1, *comment h.* at 374 (2003).

convincing evidence that the unambiguous language used by Isvik was the product of mistake and that her true intent was only to discharge the Bank as trustee. Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[25] It has been described as "more than a preponderance of evidence, but less than proof beyond a reasonable doubt."[26] Evidence may be clear and convincing despite the fact that other evidence may contradict it.[27] But even taking into consideration that the trial court saw and heard the testimony of the witnesses, we conclude that the conflicting evidence as to Isvik's intent is at least evenly balanced. Based upon our review of this record, we cannot reach a firm belief or conviction that Isvik mistakenly expressed her true intent in her letter to the Bank. Accordingly, we conclude that the county court erred in reforming the unambiguous written notice of revocation which Isvik submitted to the trustee.

## V. CONCLUSION

For the reasons discussed, we conclude that the county court did not err in receiving extrinsic evidence of Isvik's intent when she signed and mailed her letter to the Bank, in which letter she unambiguously stated that she was revoking her trust. Based upon our de novo review, we conclude that it has not been proved by clear and convincing evidence that Isvik's statement of her intent was the product of a mistake. The trust was revoked and ceased to exist prior to Isvik's death. Accordingly, we reverse the judgment of the county court and remand the cause with directions to vacate its order of March 10, 2006, and dismiss the trust administration proceeding.

REVERSED AND REMANDED WITH DIRECTIONS.

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[25] *Nebraska Legislature on behalf of State v. Hergert*, 271 Neb. 976, 720 N.W.2d 372 (2006).

[26] *In re Interest of Eden K. & Allison L.*, 14 Neb. App. 867, 875, 717 N.W.2d 507, 514 (2006); *In re Interest of Kindra S.*, 14 Neb. App. 202, 705 N.W.2d 792 (2005).

[27] *In re Estate of Brionez*, 8 Neb. App. 913, 603 N.W.2d 688 (2000).

# ALAN H. GOODMAN AND KATHLEEN M. BRENNAN, APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

742 N.W.2d 26

Filed November 30, 2007. No. S-06-532.

1. **Zoning: Appeal and Error.** On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.
2. ____: ____. In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Words and Phrases.** Jurisdiction is defined as a court's power or authority to hear a case.
5. **Jurisdiction: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction.
6. **Final Orders: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006), an appeal must be filed within 30 days of the final order from which an appeal is taken.
7. **Motions for New Trial: Pleadings: Time: Appeal and Error.** Generally, the running of the statutory time for filing an appeal may be tolled upon the filing of a motion for new trial or a motion to alter or amend.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Appeal dismissed.

William J. Brennan for appellants.

Alan M. Thelen, Assistant Omaha City Attorney, for appellee City of Omaha.

J. William Gallup for appellees Anthony L. Gross et al.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

The Omaha Zoning Board of Appeals (the Board) approved for a 5-year time period a request for a variance by Midwest Accounting & Tax Service, Inc. (Midwest). Alan H. Goodman and Kathleen M. Brennan (the appellants) filed a petition appealing

this approval to the district court for Douglas County. The district court affirmed the decision of the Board and dismissed the appellants' appeal. Within 10 days of the district court's order, the appellants filed a motion for new trial and a motion to alter or amend. The district court denied the appellants' motions, and the appellants perfected this appeal.

## BACKGROUND

Anthony L. Gross, trustee of the Richard Gross Living Trust, was issued a violation by the City of Omaha Planning Department as a result of Midwest's operation of an accounting and tax business out of a residential home located in Omaha, Nebraska. Gross was directed to remove the operation of Midwest from the dwelling or comply with the Omaha Municipal Code. Midwest applied to the Board for a variance from Omaha zoning ordinances in order to continue conducting its business from the residence. Midwest, which had operated at the residential location since 1976 and employed four full-time employees and one part-time employee during the busy season, based its application on unnecessary hardship. On June 16, 2005, the Board approved Midwest's request, subject to the following restrictions: Midwest is allowed to operate at the residential location for a maximum of 5 years, Midwest is not allowed to advertise on the property, and Midwest is not allowed to employ more employees than the number it currently employed.

The appellants filed a petition on appeal with the district court. At the hearing before the court, the appellants offered 14 exhibits, which included the bill of exceptions from the proceedings before the Board. The court received into evidence exhibits 1 and 2, which composed the bill of exceptions, and exhibit 13 which was a copy of an Omaha ordinance. The court sustained objections made to the remaining exhibits.

On January 13, 2006, the district court entered an order affirming the decision of the Board and dismissing the appellants' appeal. The court found that the Board's decision was legal, was supported by the evidence, and was not arbitrary, unreasonable, or clearly wrong. On January 23, the appellants filed a motion for new trial and a motion to alter or amend the judgment or

order. The district court overruled the appellants' motions on April 13. On May 12, the appellants filed this appeal.

## ASSIGNMENTS OF ERROR

The appellants contend the district court erred in (1) overruling their motion for new trial and motion to alter and amend the judgment, (2) allowing conduct prohibited by Omaha zoning ordinances when Midwest was in violation of those ordinances when it filed its request for a variance, (3) failing to receive into evidence newly discovered evidence, (4) affirming the variance granted by the Board when the record contained no evidence of hardship, (5) affirming the Board's decision when state statute allows the Board to grant variances only where the spirit of the ordinance shall be observed, (6) finding that an inconvenience translates into a hardship for Midwest, and (7) allowing a board member to have prehearing contact with two of Midwest's stockholders on three occasions.

## STANDARD OF REVIEW

[1,2] On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.[1] In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law.[2]

## ANALYSIS

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3] Accordingly, before we address the merits of the appellants' claims, we must first determine whether we have jurisdiction over this appeal.

[4-7] Jurisdiction is defined as a court's power or authority to hear a case.[4] An appellate court acquires no jurisdiction unless

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[1] *Lamar Co. v. Omaha Zoning Bd. of Appeals*, 271 Neb. 473, 713 N.W.2d 406 (2006).

[2] *Id.*

[3] *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

[4] *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996).

the appellant has satisfied the requirements for appellate jurisdiction.[5] Pursuant to Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006), an appeal must be filed within 30 days of the final order from which an appeal is taken. Generally, the running of the statutory time for filing an appeal may be tolled upon the filing of a motion for new trial or a motion to alter or amend.[6]

Within 10 days of the district court's January 13, 2006, order, which affirmed the decision of the Board, the appellants filed both a motion for new trial and a motion to alter or amend. The appellants did not file their notice of appeal until May 12, which was within 30 days of the district court's April 13 order overruling the appellants' motion for new trial and motion to alter or amend. The jurisdictional question before this court is whether the appellants' motions tolled the statutory time for filing an appeal.

### Motion for New Trial

We have stated:

> A motion for a new trial is restricted to a trial court, and where the district court acts in the capacity of an appellate court, such a motion is not a proper pleading and it does not stop the running of time for perfecting an appeal. This is true whether that court is hearing appeals from the county court or from some other lower tribunal.[7]

In *Hueftle v. Northeast Tech. Community College*,[8] we concluded that a motion for new trial filed with the district court did not toll the time within which to file an appeal where the district court functioned as an intermediate court of appeals. In *Hueftle*, the appellee filed a petition in error in the district court from the Northeast Technical Community College Board of Governors'

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[5] *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994).

[6] See *Jackson v. Board of Equal. of City of Omaha*, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

[7] *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 112-13, 459 N.W.2d 519, 522 (1990). See, also, *Morello v. City of Omaha*, 5 Neb. App. 785, 565 N.W.2d 41 (1997).

[8] *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993).

decision terminating the employment of the appellee. The district court vacated the board's decision, and the board filed a motion for new trial. The district court denied the board's motion, and the board appealed. The board's appeal was filed less than 30 days after the district court denied its motion, but more than 30 days after the court's order vacating the board's decision was entered.

We explained in *Hueftle* that although a motion for new trial may be appropriately filed in a trial court,

> "[i]t is improper to move for a new trial in a court which reviewed the decision of a lower court or administrative agency and thus functioned not as a trial court but as an intermediate court of appeals. . . . It necessarily follows then that the filing of a motion for new trial in a court which functioned as an intermediate court of appeals does not stop the running of the time within which to perfect an appeal from the reviewing court."[9]

The present case concerns an appeal from a zoning board of appeals to the district court. Decisions of the zoning board of appeals are reviewable by a district court pursuant to Neb. Rev. Stat. §§ 14-413 and 14-414 (Reissue 1997).[10] Section 14-413 provides that a zoning board of appeals' decision may be reviewed by a district court, but the scope of the district court's review is limited to the legality or illegality of the board's decision. Section 14-414 provides that the district court's authority is limited to the power to reverse, modify, or affirm the decision brought before that court for review. In *Kuhlmann v. City of Omaha*,[11] we characterized the district court's role in appeals from a zoning appeals board as an appellate court. Because the district court in this case functioned as an intermediate court of appeals, and not as a trial court, the appellants' motion for new trial did not stop the running of the time within which to perfect an appeal.

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[9] *Id.* at 687, 496 N.W.2d at 507 (citation omitted).

[10] *Kuhlmann v. City of Omaha, supra* note 4.

[11] *Id.*

### MOTION TO ALTER OR AMEND

The appellants did not file an appeal within 30 days of the district court's January 13, 2006, order. Because the appellants' motion for new trial did not toll the time within which to file an appeal, this court lacks jurisdiction of this appeal unless the 30-day time period was tolled by the appellants' motion to alter or amend.

Like a motion for new trial, a timely motion to alter or amend tolls the time for filing a notice of appeal.[12] Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2006) provides in part, "A motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment." Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2006), defines a judgment as "the final determination of the rights of the parties in an action." We described "judgment" in *Strunk v. Chromy-Strunk*[13] as "a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist."

As noted above, the district court in this case was functioning as an intermediate court of appeals. The order issued by the district court was not a judgment, but, rather, was an appellate decision reviewing the judgment rendered by the Board. Accordingly, we determine that under these circumstances, the appellants' motion to alter or amend was not an appropriate motion to file after the district court's decision and did not toll the time for filing a notice of appeal.

## CONCLUSION

Because the appellants did not file a notice of appeal within 30 days of the district court's January 13, 2006, order and because the time period in which to file an appeal was not tolled, this court does not have jurisdiction over the appellants' appeal.

APPEAL DISMISSED.

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[12] See *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

[13] *Strunk v. Chromy-Strunk*, 270 Neb. 917, 929, 708 N.W.2d 821, 834 (2006).

# IN RE GUARDIANSHIP AND CONSERVATORSHIP OF LINDA S. CORDEL, AN INCAPACITATED AND PROTECTED PERSON. HARRY Y. WOLFSON, APPELLANT, V. WILLIAM E. SEIDLER, JR., GUARDAN AND CONSERVATOR OF LINDA S. CORDEL, APPELLEE.

741 N.W.2d 675

Filed November 30, 2007. No. S-06-591.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Jurisdiction.** The question of jurisdiction is a question of law.
4. **Statutes.** The meaning of a statute is a question of law.
5. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
6. **Guardians and Conservators: Interventions: Standing: Words and Phrases.** Under Neb. Rev. Stat. § 30-2645(a) (Reissue 1995), any person interested in the welfare of a protected person has standing to intervene, and that person is not limited by the definition of "interested person" found in Neb. Rev. Stat. § 30-2209(21) (Cum. Supp. 2006).
7. **Guardians and Conservators: Accounting: Evidence.** There is no final adjudication of an intermediate account of a conservator without an evidentiary hearing.

Appeal from the County Court for Douglas County: LAWRENCE BARRETT, Judge. Reversed and remanded for further proceedings.

Clayton Byam, Thomas F. Hoarty, Jr., and Daniel T. Hoarty, of Byam & Hoarty, for appellant.

W. Matthew Semple, of Seidler & Seidler, P.C., for appellee, and William E. Seidler, Jr., of Seidler & Seidler, P.C., pro se.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## BACKGROUND

Harry Y. Wolfson is the father of Linda S. Cordel, an incapacitated adult, and is also trustee of a trust for her

benefit. Wolfson appeals an order of the county court approving $80,002.81 in fees and expenses for Cordel's guardian and conservator. Wolfson asserts that the county court erred in approving an intermediate account without first conducting an evidentiary hearing, which he had requested. The guardian and conservator asserts that Wolfson lacked standing to intervene in the accounting[1] and to prosecute this appeal.[2]

## FACTS

Cordel is approximately 53 years old and has multiple sclerosis. Her condition makes decisionmaking difficult and requires care in an assisted living facility. Cordel appointed Wolfson as her attorney in fact pursuant to a contingent plenary durable power of attorney.[3] Additionally, it is undisputed that Wolfson is the trustee of a discretionary trust benefiting Cordel, and he voluntarily signed a personal guaranty of the payments for the assisted living facility where Cordel is currently residing.

In October 2002, Cordel's husband petitioned for the appointment of a guardian and conservator for Cordel, nominating himself as guardian and conservator. Wolfson objected to the allegation of need for a guardian or conservator, but cross-petitioned that in the event Cordel were declared incapacitated, Wolfson should be appointed guardian and conservator. The court ultimately appointed an agreed-upon neutral party, William E. Seidler, Jr., as guardian and conservator. Cordel's marriage has since been dissolved.

This appeal concerns the court's approval of an intermediate account of Seidler's fees and expenses. Seidler filed a motion for approval of accounting and fees on March 24, 2006. The motion was accompanied by a sworn affidavit and an attached itemization detailing $80,002.81 in fees and expenses over the previous 4 years. All work relating to the guardianship and conservatorship, including making telephone calls and reviewing bills, was charged at either Seidler's hourly rate of $125 or the

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[1] See Neb. Rev. Stat. §§ 30-2209(21) (Cum. Supp. 2006) and 30-2645(a) (Reissue 1995).

[2] See Neb. Rev. Stat. § 30-1601 (Cum. Supp. 2006).

[3] See Neb. Rev. Stat. § 49-1515 (Reissue 2004).

lower rates of his legal assistants. The totals were 478.6 hours at $125 per hour, 74.7 hours at $94.38 per hour, and 234.3 hours at $50 per hour. The itemization claimed $631.21 in costs incurred and $781.60 in expenses.

Wolfson filed, as "the father of the Incapacitated and Protected Person and an interested party herein," an objection to the fees and moved the court for an evidentiary hearing on his objection. Seidler filed a motion to strike based on the alleged failure of Wolfson to indicate his standing in the proceedings. A hearing on the motions was held on April 26, 2006. Wolfson's attorney responded to Seidler's motion to strike by arguing at the hearing that Wolfson had standing as a person interested in Cordel's welfare.[4] When a person identified in the record only as "a male voice," presumably Seidler or his attorney, suggested that Wolfson did not have standing, the court said, "Yeah, we've been through it several times; I agree." A "male voice," presumably Wolfson or his attorney, argued that he believed $80,000 was a large sum and that an evidentiary hearing should be held to determine whether that amount was fair and reasonable. The court, without receiving any evidence or listening to any testimony or argument regarding the reasonableness of the fees, approved the fees. The court concluded: "Well, it'll be appealed no matter what their [sic] ruling is, because [Wolfson] is not going to agree to pay . . . Seidler; never wanted to in the first place. I'm going to show your objection is made and it's overruled. The fees are approved." A written order was issued that same day approving the fees, but indicating, on a standardized form, that "no objections to the accounting (or allowance of fees) has/have been filed." Wolfson appeals.

## ASSIGNMENT OF ERROR

Wolfson assigns that the county court erred when it granted Seidler's application for fees without receiving any evidence as to the reasonableness of the fee application and without holding an evidentiary hearing on the fee application.

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[4] See § 30-2209(21).

## STANDARD OF REVIEW

[1,2] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.[5] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[6]

[3-5] The question of jurisdiction is a question of law.[7] The meaning of a statute is also a question of law.[8] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[9]

## ANALYSIS

The county court's April 26, 2006, order did not specifically address Wolfson's motion for an evidentiary hearing, but approved the intermediate account after stating that "no objections" were filed. While the court stated at the hearing that Wolfson's objection was "overruled," the court also indicated it did not believe Wolfson had standing to object. Based on the record before us, we conclude that the basis of the county court's decision was its conclusion that Wolfson lacked standing to intervene to request an evidentiary hearing.

Wolfson asserts that in his personal capacity and in his capacity as the trustee of a trust of which Cordel is a beneficiary, he has standing to intervene in the intermediate account because he is an "[i]nterested person" to the proceedings as defined in § 30-2209(21), which states in full:

> Interested person includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may

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[5] See *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004).

[6] *Id.*

[7] *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

[8] *In re Estate of Nemetz*, 273 Neb. 918, 735 N.W.2d 363 (2007).

[9] *In re Estate of Mousel*, 271 Neb. 628, 715 N.W.2d 490 (2006).

> be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

Wolfson also asserts that he has standing as a "person interested in the welfare" of Cordel, a protected person, as provided for in § 30-2645(a). Section 30-2645, entitled "Petitions for orders subsequent to appointment," states:

> (a) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order (1) requiring bond or security or additional bond or security, or reducing bond, (2) requiring an accounting for the administration of the trust, (3) directing distribution, (4) removing the conservator and appointing a temporary or successor conservator, or (5) granting other appropriate relief.

Seidler argues that Wolfson does not have standing to ask for an evidentiary hearing. Seidler asserts that the "[a]ny person interested" language of § 30-2645(a) is constrained by the definition of "[i]nterested person" in § 30-2209(21). Seidler argues that § 30-2209(21) is narrowly limited to the categories of persons specifically listed. According to Seidler, Wolfson does not qualify under any of these categories.

In *In re Guardianship of Gilmore*,[10] the Nebraska Court of Appeals considered whether the Department of Health and Human Services had standing to petition for the removal of a guardian. The court noted that the part of § 30-2209(21) which states that the meaning of "interested person" would vary from time to time, and be determined according to the particular purposes of and matter involved in any proceeding, "would appear to give that otherwise narrow definition considerable breadth."[11] Ultimately, though, the court relied on a provision which gave

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[10] *In re Guardianship of Gilmore*, 11 Neb. App. 876, 662 N.W.2d 221 (2003).

[11] *Id.* at 881, 662 N.W.2d at 225.

standing to petition for removal of a guardian to "'any person interested in [the] welfare'" of the ward.[12] The court found the phrase "any person interested," although not specifically defined in the probate code, to be broader than the definition of "interested person" contained in § 30-2209(21).

The court in *In re Guardianship of Gilmore* noted that the phrase "person interested in the welfare" of a protected person appears only in those statutes dealing with protected persons. The court concluded that the phrase showed a legislative intent "to allow persons who are interested in a protected person, but who do not satisfy the definition of 'interested person,' to bring matters affecting the welfare of protected persons to the attention of the local probate court."[13] In other words, the statutes referring to "any person interested in the welfare" of a protected person "are worded to allow people without a legal interest to bring the matter to the local court's attention."[14]

In *In re Conservatorship of Kloss*,[15] the Supreme Court of Montana similarly considered the meaning of "'*any* person who is interested in [the protected person's] welfare,'" in a statute specifying who had standing to petition for the appointment of a conservator. The court held that an attorney who sought to intervene was not required to have a personal stake in the outcome in order to have standing. While other statutory provisions relating to conservatorships contained "interested person" terminology similar to that contained in § 30-2209(21), the court stated that it refused to limit the language of the more specific statute with the narrower definition of "interested person." The court noted that the narrower definition of "interested person" stated that its meaning "'may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding'" and found the statutory provision for "'any person who is interested'" in the welfare

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[12] *Id.*

[13] *Id.* at 881-82, 662 N.W.2d at 225-26.

[14] See *id.* at 882, 662 N.W.2d at 226.

[15] *In re Conservatorship of Kloss*, 326 Mont. 117, 119, 109 P.3d 205, 207 (2005) (emphasis in original).

of the protected person to be more directly relevant.[16] This, the court concluded, reflected the Legislature's intent to broadly define those who have standing to petition the court on behalf of another.[17]

We agree with the foregoing analysis. We note that the term "interested person" is found primarily in provisions of the probate code relating to the administration of decedents' estates.[18] In contrast, the "[a]ny person interested in the welfare" language of § 30-2645(a) is found only in statutes concerning the welfare of an incapacitated person. This departure from the financial interests specified in § 30-2209(21) is appropriate, given the different focus of proceedings involving protected persons.

[6] We thus conclude that Wolfson's standing to intervene in his daughter's guardianship and conservatorship is not limited to one of the narrow categories listed in § 30-2209(21). In construing a statute, we will give the statute its plain and ordinary meaning and we will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[19] The plain meaning of § 30-2645(a) is evident: "*Any* person interested in the welfare of a person for whom a conservator has been appointed" has standing to intervene. (Emphasis supplied.) To limit the persons "interested in the welfare" of the protected person to those listed in § 30-2209(21) would be superfluous and incongruent with the term "any."[20] It would also be contrary to the language of § 30-2209(21) itself, which specifically states that the meaning of an "[i]nterested person" may vary.

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[16] *Id.* at 120, 109 P.3d at 207.

[17] See *id.* See, also, *In re Estate of Edwards*, 794 P.2d 1092 (Colo. App. 1990).

[18] See Neb. Rev. Stat. §§ 30-2220 and 30-2467 (Cum. Supp. 2006) and 30-2325, 30-2356, 30-2406, 30-2410, 30-2416, 30-2421, 30-2425, 30-2427, 30-2432, 30-2438, 30-2440, 30-2443, 30-2445 through 30-2450, 30-2457, 30-2473, 30-2474, 30-2476, 30-2482, 30-24,103, 30-24,122, and 30-24,124 (Reissue 1995).

[19] See *Japp v. Papio-Missouri River NRD*, 273 Neb. 779, 733 N.W.2d 551 (2007).

[20] See § 30-2645(a).

Seidler next argues that even if § 30-2645(a) is interpreted broadly, Wolfson failed to demonstrate his interest in Cordel's welfare. The Court of Appeals in *In re Guardianship of Gilmore*[21] stated that "the county judge, under the applicable standard of review, can make the determination of whether the petitioner is really interested in the welfare of the person subject to the proceedings." Seidler concedes that "a father is quite likely interested in the welfare of his child."[22] He reads *In re Guardianship of Gilmore*, however, as stating that this interest must be independently evidenced by the record, regardless of whether the genuine interest was challenged below. Seidler then points out that there was no evidence offered or received at the April 26, 2006, hearing before the county court.

The fact that someone is the parent of the protected person would normally be strong evidence of interest in the protected person's welfare. Parents are specifically given standing for other proceedings such as the appointment of a guardian,[23] appointment of a conservator, or other protective order.[24] In addition, Neb. Rev. Stat. § 30-2654(a)(1) (Reissue 1995) states that the conservator, after appointment, is to "consider recommendations relating to the appropriate standard of support, education and benefit for the protected person made by a parent." Still, we agree with Seidler that under § 30-2645(a), being a parent of the protected person does not guarantee standing.

We disagree, however, with Seidler that standing was properly denied in this case. Wolfson cannot be prejudiced for the failure to present evidence on standing when the very issue Wolfson complains of is the county court's refusal to grant Wolfson's request for an evidentiary hearing. Seidler's only challenge to Wolfson's standing was made the day the court heard the motions. Seidler made no specific allegation nor

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[21] *In re Guardianship of Gilmore, supra* note 10, 11 Neb. App. at 882, 662 N.W.2d at 226.

[22] Brief for appellee at 16.

[23] Neb. Rev. Stat. §§ 30-2617 (Reissue 1995) and 30-2625 and 30-2627 (Cum. Supp. 2006).

[24] Neb. Rev. Stat. §§ 30-2633, 30-2634, and 30-2639 (Cum. Supp. 2006).

presented evidence indicating that Wolfson was not, in fact, interested in Cordel's welfare.

It is unclear from this record whether the county court would have granted Wolfson's request for an evidentiary hearing had it found Wolfson to have standing. But we note that we have previously disapproved of a probate court's practice of holding informal discussion instead of an evidentiary hearing. We have, in other circumstances, vacated orders for lack of competent evidence because an evidentiary hearing was not held.[25] We have not specifically addressed intermediate accounts, but Neb. Rev. Stat. § 30-2648 (Reissue 1995) states in relevant part that "[s]ubject to appeal or vacation within the time permitted, an order, *made upon notice and hearing, allowing an intermediate account of a conservator*, adjudicates as to his liabilities concerning the matters considered in connection therewith." (Emphasis supplied.)

The allowance of conservator fees is largely a matter of discretion, and the reasonable value of services is a question of fact.[26] But the deference granted to the county court is based on the fact that it had the opportunity to observe the witnesses and evaluate their credibility.[27] In considering language similar to that of § 30-2648, the court in *In re Trust Created by Will of Enger* explained:

> A requirement of "hearing" in judicial proceedings, aside from any constitutional requirement of due process, by common consent presupposes a proceeding before a competent tribunal for the trial of issues between adversary parties, the presentation and consideration of proofs and

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[25] See *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005). See, also, *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006); *In re Guardianship & Conservatorship of Trobough, supra* note 5.

[26] *In re Conservatorship of Mansur*, 367 N.W.2d 550 (Minn. App. 1985). See, also, Neb. Rev. Stat. § 30-2643 (Cum. Supp. 2006); *In re Guardianship & Conservatorship of Karin P.*, 271 Neb. 917, 716 N.W.2d 681 (2006) (whether guardian ad litem fees were reasonable depended on equities and circumstances of each particular case).

[27] See *In re Conservatorship of Mansur, supra* note 26.

arguments, and determinative action by the tribunal with respect to the questions raised by the issues presented.[28]

[7] We conclude that pursuant to § 30-2648, there is no final adjudication of an intermediate account without an evidentiary hearing. Because no hearing was held in this case, the court shall, after remand, hold a hearing regarding Seidler's fees and expenses.

## CONCLUSION

The county court's dismissal of Wolfson for lack of standing is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[28] *In re Trust Created by Will of Enger*, 225 Minn. 229, 237-38, 30 N.W.2d 694, 700 (1948). See, also, *Guardianship of Estate of Slakmon*, 83 Cal. App. 3d 224, 147 Cal. Rptr. 777 (1978).

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# TERRY HICKEY AND THE FRATERNAL ORDER OF POLICE, LODGE NO. 52, APPELLANTS, V. CIVIL SERVICE COMMISSION OF DOUGLAS COUNTY, NEBRASKA, AND DOUGLAS COUNTY, NEBRASKA, APPELLEES.

741 N.W.2d 649

Filed November 30, 2007. No. S-06-802.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence.
2. **Constitutional Law: Due Process: Appeal and Error.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law upon which an appellate court is obligated to reach a conclusion independent of the court below.
3. **Constitutional Law: Due Process: Public Officers and Employees: Termination of Employment: Notice.** When a public employer deprives an employee of a property interest in continued employment, constitutional due process requires that the deprivation be preceded by (1) oral or written notice of the charges, (2) an explanation of the employer's evidence, and (3) an opportunity for the employee to present his or her side of the story.

4. **Administrative Law: Words and Phrases.** "Arbitrary and capricious" action by an administrative agency is action taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellants.

Stuart J. Dornan, Douglas County Attorney, Peter J. Garofalo, and Bernard J. Monbouquette, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

This case presents a petition in error from the decision of the Douglas County Civil Service Commission (the Commission) to approve the termination of Terry Hickey's employment with Douglas County. This decision was as a consequence of a sick leave violation and other rule violations from the preceding 12 months. Hickey's primary argument is that his termination of employment was based on a sick leave violation that was not listed in the predisciplinary hearing notice and that, therefore, such termination violated his right to due process of law.[1] Hickey also argues that the termination of his employment was disproportionate to the violation.

## BACKGROUND

Hickey had been an employee of Douglas County for nearly 16 years. He had been working for approximately 5 years as a security officer at the Douglas County Health Center (the Health Center) before being discharged. On November 1, 2004, Hickey received a 3-day suspension for attempting to place handcuffs on a female employee at the Health Center and for

[1] See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

pulling the hair on the back of her neck. On May 12, 2005, Hickey received a 3-day unpaid suspension and was required to attend sexual harassment training after it was found that he had been verbally inappropriate and used profanity with a female employee of another Douglas County department.

On May 19, 2005, Hickey suffered a fracture to his hand while repairing a truck in his driveway. There is no evidence that this injury occurred while working at outside employment. Because Hickey's security job presented a "potential combative situation," his physician recommended that Hickey not return to his job as a security officer for 4 weeks. Healing went more slowly than expected, and Hickey was not released to work until July 22. From May 19 to July 22, Hickey took paid sick leave from Douglas County.

Besides the "potential risk environment" of his security job, Hickey's physician advised Hickey that he could use his hand within the cast as he was able. Hickey had his own lawn care and snow removal business, and during the time he was on sick leave, he continued to work, mowing and treating lawns for his business.

The Commission's personnel policy manual provides for paid sick leave under article 21, section 2. Section 2(a) states in part, "Employees are prohibited from working in any other employment while utilizing sick leave with pay. Violation of these provisions may result in disciplinary action." Section 2(b), entitled "Definition of Sick Leave," lists reasons for absence that qualify as sick leave. The first of the reasons listed, section 2(b)(1), is "[a]bsence necessitated because of bona fide illness or injury," with the caveat that "employees who become injured as a result of engaging in secondary employment outside of the County service shall not be entitled to sick leave with pay for such injury."

James C. Tourville, the director of the Health Center, sent Hickey a notice of a predisciplinary hearing. The notice listed the Commission rules under which the charges against Hickey had been brought. That list included article 13, section 5(a)(9), misuse of sick leave, and article 21, section 2(a), sick leave. The notice did not specifically list article 21, section 2(b). The notice also listed the November 1, 2004, and May 12, 2005,

disciplinary actions and advised that the current action could constitute multiple instances of disciplinary action within a 12-month period. Under the "Notice of Pending Charges and Explanation of Evidence" portion, it stated in full:

> May 19, 2005
>
> It was brought to Management's attention that you had injured your right hand while off duty.
>
> You informed Management later this same day that your right hand had been fractured and you would need to be off work on medical leave for three (3) weeks.
>
> June 21[,] 2005
>
> It was brought to Management's attention that you were seen unhitching your equipment trailer from your dump truck and that you were working on your second job.
>
> July 12-13, 2005
>
> You were observed using your right hand, without a cast, performing duties associated with your second job. These duties included you turning a valve and cranking the hitch on your trailer with your right hand.
>
> You were also observed using your right hand to support your weight, to pull yourself up on your tractor, and driving the tractor while spraying chemical on a field in Gretna[, Nebraska].
>
> This work was being performed while you were on Sick Leave from Douglas County due to an injury to your right hand.
>
> Your absence from work on Sick Leave continued through July 21, 2005.

Hickey's employment was terminated after the disciplinary hearing. We do not have a record of that proceeding. The notice of disciplinary action sent on July 29, 2005, informed Hickey of his termination of employment. The notice, citing article 21, section 2(a), repeated the explanation of the evidence quoted above and summarized that during the disciplinary hearing, Hickey was told he had been working at his second job while on paid sick leave.

Hickey appealed to the Commission, which held a hearing on October 13, 2005. In opening statements to the Commission, Hickey's counsel stated that to his knowledge, the only reason

Hickey's employment was terminated was because he was alleged to have been engaged in off-duty employment while on sick leave and that termination was excessive. Hickey's counsel argued that Hickey was unaware of the rule against working while on paid sick leave; Hickey's supervisor knew Hickey had a second job, and Hickey's supervisor never advised Hickey of this rule or asked him to stop working during sick leave. The county attorney, in his opening remarks, responded: "And the evidence will show that . . . Hickey not only ignored certain work rules prohibiting the engagement in secondary employment while being on sick leave. The work rules would state that one is disqualified from receiving sick leave benefits when one becomes injured in another line of work." It is undisputed that this was the first time it had ever been suggested that Hickey had violated section 2(b), as opposed to 2(a).

Hickey called Tourville as his first witness. Tourville testified that he was not Hickey's immediate supervisor but that, as director of the Health Center, it was ultimately his decision to terminate Hickey's employment. Hickey's counsel handed Tourville a copy of the notice of disciplinary action Tourville had sent to Hickey, and the following colloquy took place:

> [Hickey's counsel:] Now, is it your understanding of the facts of this case that . . . Hickey was injured while he was engaging in employment outside of the . . . Health Center?
>
> [Tourville:] That's correct.
>
> Q. Who told you that?
>
> A. I don't recall who told me, but I had — I had learned that he — was informed that he had injured himself outside of employment.
>
> . . . .
>
> Q. . . . I'll show you page 21-2 of Exhibit 2 which is part of the personnel manual . . . Do you see where —
>
> . . . .
>
> Q. — it directs that a person is not eligible for sick leave if they're [sic] injured in employment outside of their [sic] employment with the County?
>
> A. Yes, I do.

Q. Was that one of the reasons that you disciplined — you decided to terminate this man?

A. That was the reason he couldn't use sick leave while he was injured outside his — outside of the County employment, yes.

Q. Okay. Well —

A. Yes.

Q. Well, look at [the notice of disciplinary action]. And you show me where you mentioned to him anywhere in there that he violated that work rule.

A. It would be Section — Article 21, Section 2, sick leave, on page two of the letter.

Q. And Section 2(a), sick leave — if I can see this.

A. Uh-huh, sure. It would be on the page before. It starts on the page before that.

Q. Oh, so it wasn't this provision. It was some other provision; right?

A. It's part of that same provision.

Q. Oh, because this is under Section 2(b), isn't it?

A. (No audible response.)

Q. Let's take a look at the whole manual. If you look at Section 2(a), that provides that you can't receive sick leave if you're working off duty; right?

. . . .

Q. . . . So . . . under Section A, were employees advised — that employees are prohibited from working in any — any other employment while utilizing sick leave pay; right?

A. That's correct.

Q. And that's why — that's why you terminated this man; correct?

A. That would be correct.

Q. Okay. So the fact that he was receiving sick leave while he was — because you think he was injured in his employment outside of the County, that didn't have anything to do with it, did it?

A. Rephrase your question.

Q. You see at page 21-2 under Section (b)(1) of this particular article where . . . .

. . . .

Q. . . . [E]mployees who become injured as a result of engaging in secondary employment outside of the County service shall not be entitled to sick leave with pay for such injuries.

. . . .

Q. Now, does that — are you telling me that that had something to do with your decision to discipline this guy?

A. I relied on Article 21 under "discipline" that states that he could not be paid sick leave when he was — when he injured himself on another job outside the County employment.

Q. Did you ever tell him that?

. . . .

A. He had all this at the time of the hearing.

Q. So you are telling us now that you told him that he shouldn't have been on sick leave because he got injured while he was off duty and working in some other employment?

A. That was cited on the letter that we sent to him —

Q. Where?

. . . .

A. What I cited was Article 21, Section 2(a), sick leave.

Q. Okay. And this is Article 21, Section 2(b), isn't it?

A. I cited 2(a).

Q. Okay. So you never told him that you thought he violated Section 2(b)?

A. No, I cited 2(a).

Q. So you would agree that my question — that this statement is correct: That you never told him that you thought he violated Section 2(b) or Article 21?

A. No, I told him 2(a), Section 2(a).

During cross-examination, the county attorney confirmed that Tourville, as the department head, relied on direct supervisors to report on employee infractions. He then reviewed with Tourville the notice of predisciplinary hearing that Tourville sent to Hickey and had Tourville read article 21, section 2(a), "[e]mployees are prohibited from working at any other employment while

utilizing sick leave with pay." Tourville then agreed that it was "fair to say" that "the discipline imposed on July 29, 2005, against . . . Hickey rested on his actions as set forth in the notice of disciplinary action under those particular provisions." Tourville further testified that the discipline rested on the accumulation of violations within a 12-month period.

After Tourville's testimony, Hickey made a motion to dismiss based on Tourville's testimony that the reason he terminated Hickey's employment was his belief that Hickey had been injured in other employment. Hickey argued that it was a clear violation of Hickey's due process rights to have never been advised in the notice of predisciplinary hearing that he had violated article 21, section 2(b). The county attorney responded that Hickey had purposefully called Tourville first in order to confuse him as to what grounds Hickey's discipline was based upon. According to the county attorney, Tourville had clarified on cross-examination that the basis for the sick leave violation was section 2(a) and not section 2(b) and that section 2(a) was listed in Hickey's notice of predisciplinary hearing, as well as his postdisciplinary notice.

The motion to dismiss was denied, and the hearing proceeded with the testimony of Chuck Franek. Franek is the head of security at the Health Center and was Hickey's supervisor. Franek testified that he never inquired about whether Hickey was working a second job when he was injured and that he never had any knowledge that Hickey's injury was incurred in secondary employment. Franek explained that the prohibition against taking sick pay when the absence is due to an on-the-job injury from outside employment had "nothing to do with" Hickey's violation. Instead, Franek explained the violation in question involved working in secondary employment while receiving paid sick leave, a violation under section 2(a).

Photographic evidence was introduced at the hearing showing that Hickey continued to work, maintaining lawns for his lawn care business on dates for which he was receiving paid sick leave. There was no evidence that the hand injury leading to the sick leave was connected with outside employment.

The Commission upheld the Health Center's decision to terminate Hickey's employment, and Hickey filed a petition in

error in the district court. The district court affirmed Hickey's termination of employment. Hickey appeals.

## ASSIGNMENTS OF ERROR

Hickey assigns that the district court erred in (1) holding that Hickey received adequate due process at his pretermination and posttermination of employment hearings and (2) upholding the decision of the Commission denying Hickey's appeal of his termination of employment.

## STANDARD OF REVIEW

[1] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence.[2]

[2] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.[4]

## ANALYSIS

Hickey first contends that the district court should have reversed his termination of employment because testimony by Tourville at the Commission hearing shows that such termination was based, in whole or in part, on an alleged violation of section 2(b), prohibiting taking paid sick leave when the leave was necessitated by injury incurred in secondary employment. Hickey asserts that because he was not informed of this alleged ground for his discipline, he was not afforded a meaningful opportunity to respond to the allegation, and that his due process rights were violated.

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[2] See, *Maxon v. City of Grand Island*, 273 Neb. 647, 731 N.W.2d 882 (2007); *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992).

[3] *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004); *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991).

[4] See *Barnett v. City of Scottsbluff, supra* note 3.

[3] The parties do not dispute that Hickey had a protected property interest in his continued employment. In *Cleveland Board of Education v. Loudermill*,[5] the U.S. Supreme Court held that when a public employer deprives an employee of a property interest in continued employment, constitutional due process requires that the deprivation be preceded by (1) oral or written notice of the charges, (2) an explanation of the employer's evidence, and (3) an opportunity for the employee to present his or her side of the story.[6] A pretermination of employment procedure functions as "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[7]

Hickey relies on *Martin v. Nebraska Dept. of Public Institutions*,[8] in which the Nebraska Court of Appeals reversed a termination of employment because of the failure to provide adequate due process. The employee's termination of employment in *Martin* was based in part on charges of insubordination. The employee was notified that he was alleged to have acted insubordinately prior to a pretermination of employment meeting with his employer. However, it was not until after this meeting that an investigation was conducted into the alleged insubordination, which included reviewing documents and interviewing the employees. The information gathered by the investigation was then relied upon by the employer when it decided to terminate his employment. The information from the investigation was not available to the employee until after such termination. The Court of Appeals concluded that the employee was denied due process because he never had an opportunity to rebut the evidence upon which his employment was terminated.

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[5] *Cleveland Board of Education v. Loudermill, supra* note 1.

[6] See, *id.*; *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999); *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995).

[7] *Cleveland Board of Education v. Loudermill, supra* note 1, 470 U.S. at 545-46.

[8] *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998).

Hickey asserts that his termination of employment was similarly based on grounds of which he was unaware prior to the decision to make such termination. We disagree. The evidence is sufficient to show that Hickey's termination of employment was, in fact, based only on the grounds stated in the predisciplinary notice. Hickey makes no argument that if his employment was actually terminated for a section 2(a) violation, as opposed to a section 2(b) violation, he was denied due process, and we find no due process violation. Hickey was notified that he was subject to discipline for working in outside employment while receiving paid sick leave. He had a chance to respond to this charge at the disciplinary hearing.

It is true that Tourville testified that he terminated Hickey's employment for receiving paid leave when his injury was incurred during secondary employment, in violation of section 2(b). But Tourville also testified, during both direct and cross-examination, that he terminated Hickey's employment for violating the policy of working in secondary employment while receiving paid sick leave, a violation of section 2(a). Nothing in Tourville's testimony demonstrates a belief that Hickey's employment was terminated for both.

Tourville's testimony began with the statement that Hickey was injured outside of his employment with the county—not that he was injured during outside employment. He then said, in response to Hickey's leading questions, Hickey violated the rule that one cannot claim paid sick leave if one's injury was incurred in secondary employment, section 2(b). But later, without expressly acknowledging the inconsistency, Tourville also clearly stated that Hickey's employment was terminated for working in outside employment while receiving paid sick leave, a violation of section 2(a). As we read the record, under examination, Tourville was simply confused. Aside from those portions of Tourville's testimony discussed above, there is nothing in the record to indicate that Hickey's last violation was based on anything other than section 2(a): working in secondary employment while receiving paid sick leave. The notice of predisciplinary hearing cites section 2(a), and the evidence listed as supporting the violation consists of facts relating to Hickey's employment while on sick leave. The postdisciplinary notice of

termination of employment again recites section 2(a) and the evidence relating to Hickey's working in secondary employment while receiving paid sick leave. Franek testified before the Commission that section 2(b) had nothing to do with Hickey's termination of employment and that Hickey's violation instead involved section 2(a). The exhibits offered by the county at the hearing before the Commission were relevant only to Hickey's outside employment during paid sick leave. In short, the record clearly establishes, despite Tourville's confusion, that Hickey's employment was terminated for violating section 2(a) and that he had notice of and the opportunity to defend himself against that charge. We find no due process violation.

Hickey also asserts that regardless of whether he received due process, we should reverse, because the Commission's order was arbitrary and capricious and was unsupported by relevant evidence. On this point, Hickey argues that the suggested disciplinary guidelines of the policy manual set forth only an oral warning or official reprimand for a first offense of misuse of sick leave. In addition, Hickey claims he was unaware of the sick leave policy prohibiting outside employment while on sick leave with pay. Hickey points out that his supervisor, Franek, never asked Hickey if he was working while on sick leave, nor did Franek inform him of this prohibition. In sum, Hickey argues that Tourville was predisposed to terminate Hickey's employment and that such termination was disproportionate to the violation.

[4] Evidence supports an administrative agency's decision reviewed in an error proceeding if the agency could reasonably find the facts for the agency's decision on the basis of the relevant evidence contained in the record before the agency.[9] "Arbitrary and capricious" action by an administrative agency is action taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.[10]

There is no dispute that Hickey violated article 21, section 2(a), of the policy manual. Nor does Hickey dispute that he

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[9] *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991).

[10] *Id.*

signed an acknowledgment of receipt of the policy manual and that he was responsible for following the rules of the manual. Hickey ignores the fact that the reason for his discharge was not just the singular sick leave violation, but that this was his third policy violation in the past 12 months.

The policy manual sets forth discharge as a reasonable consequence of a third violation of either of the rules the county found Hickey had violated on November 1, 2004, and May 12, 2005. The policy manual also recommends discharge as an acceptable consequence of a third violation of sick leave policies. The policy manual explains that although the range of reasonable penalties for various offenses refers only to successive instances of the same offense, single violations of different work rules may also occur. In that case, "the Elected Official/Department Head may wish to take action other than that delineated for the first offense under each violation." Hickey committed such violations, and the recommended discipline is within the range recommended by the county's disciplinary guidelines. As such, we conclude that Tourville's decision to discharge Hickey from his employment was supported by sufficient relevant evidence and was not arbitrary, capricious, or unreasonable.

## CONCLUSION

We affirm the decision of the district court which affirmed the Commission's decision to uphold Hickey's discharge from employment.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
JERROLD A. MCLEOD, APPELLANT.
741 N.W.2d 664

Filed November 30, 2007. No. S-07-013.

1. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. When such an allegation is made, an

evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.

2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Postconviction.** Under the Nebraska Postconviction Act, the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.
4. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
5. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
6. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea or a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
7. **Aiding and Abetting.** The common-law distinction between principal and aider and abettor has been abolished in Nebraska; a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender.
8. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant.
9. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
10. **Postconviction: Justiciable Issues: Right to Counsel.** When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Jerrold A. McLeod, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Jerrold A. McLeod is serving a life sentence on a plea-based conviction of first degree murder. He appeals from an order of the district court for Lancaster County denying his motion for postconviction relief without an evidentiary hearing. We find no error and affirm.

## I. BACKGROUND

On April 14, 1999, McLeod pled no contest to an amended information charging him with first degree murder. McLeod was 17 years old on the date of sentencing. Prior to accepting the plea, the district court questioned McLeod in order to determine whether his plea was knowingly, voluntarily, and intentionally made. McLeod informed the court that he had recently obtained his diploma through the GED program. He stated he had not taken any alcohol, drugs, or medication in the last 72 hours, nor was he under the care of a psychiatrist. The court determined he was competent.

The court then informed McLeod that his attorney had filed a motion to transfer the cause to juvenile court and that if his plea was accepted, he would be waiving the right to a hearing on that motion. It further informed him that a motion to suppress certain statements he had made was pending and that his plea would mean that the motion would not be heard. McLeod acknowledged that he understood the effect of his plea on those motions. The court then informed McLeod that he was presumed innocent and that he had a right to a jury trial, a right to confrontation, and a right to call witnesses in his defense; all rights that he would be waiving by entering the plea. McLeod

acknowledged that he was aware of the effect of his plea on his constitutional rights.

In addition, the court informed McLeod, "If you are found guilty in this case, you will be found guilty of a felony and that can be used against you later on in life." The court further explained:

> Being convicted for a felony can also lead to the loss of certain of your civil rights, including but not necessarily limited to your right to vote and your right to carry a firearm. . . .
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> . . . .
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> . . . If you should continue to get into trouble of a felony nature, the fact of this conviction could be used at some later time to make the penalty for the later conviction more severe.

The court then specifically stated, "If you are found guilty in this case . . . there is only one penalty that I can impose in this matter and that is a sentence of life imprisonment." McLeod stated that he understood the court's explanation.

The court specifically asked whether anyone had threatened, pressured, or coerced McLeod into giving up the rights it had previously explained, and he responded, "No." McLeod affirmed that other than the plea agreement, he was not promised anything in exchange for giving up his rights. He stated that he understood the rights that were explained to him and that he had no questions about them. McLeod then stated that he was satisfied with the performance of his counsel and that he freely and voluntarily waived his rights. His counsel stated that he was satisfied that McLeod understood his rights and that he knowingly, voluntarily, and intentionally waived them. The court then accepted McLeod's plea.

Thereafter, the State described the terms of the plea agreement. In exchange for McLeod's plea to first degree murder, the State agreed not to file additional charges against him related to the crimes that took place on the day of the murder, including robbery and concealing evidence. In addition, the State agreed not to file charges against McLeod related to a separate burglary committed after the murder and a separate theft committed prior to the murder. The State further agreed not to file any charges

against McLeod relating to an attempt to escape from custody after the murder.

After the plea agreement was described, McLeod again affirmed that he had not been promised anything more than the terms of the plea agreement in exchange for his plea and that no one had threatened, pressured, or coerced him to plead. The State then offered a factual basis for the charge, in which it was explained that McLeod, then 16 years old, possessed and fired a shotgun during a burglary attempt which resulted in the death of one person. After the court accepted the factual basis for the plea, it sentenced McLeod to life in prison. In doing so, the court noted, "I understand that as we have gone through the plea that . . . McLeod knows that I have no discretion in sentencing." Similarly, McLeod's counsel noted "[w]e understand the court has no discretion in sentencing . . . ." Counsel further stated that McLeod "knows he has a life sentence now that he is going to have to serve and hopefully demonstrate during his time in the institution that something good can come out of this horrible tragedy." Counsel further stated that McLeod "understands that for him to get anywhere in life and be considered for something less than [a] life sentence, he has to begin something." After imposing the life sentence, the court informed McLeod:

> What that means . . . is that you remain in prison unless and until your sentence is commuted to a term of years. Until then, you are not eligible for parole. Whether it is ever commuted, is not something that is not [sic] up to me. But at some time, unless the rules change between here and then, it is up to the Board of Pardons.

Neither McLeod nor his counsel offered any objection either before or after the sentence was imposed.

McLeod's trial counsel timely filed a direct appeal, based solely upon a claim that his sentence was excessive. This court granted the State's motion for summary affirmance.[1] On September 7, 2006, McLeod filed a verified motion for postconviction relief, asserting that both his trial and appellate counsel had been ineffective. McLeod also filed motions to proceed in

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[1] *State v. McLeod*, 258 Neb. xxi (No. S-99-717, Nov. 10, 1999).

forma pauperis and for appointment of counsel. After ordering the State to respond to the postconviction motion, the district court denied McLeod postconviction relief without an evidentiary hearing or appointment of counsel. McLeod filed this timely appeal, which we moved to our docket based on our statutory authority to regulate the caseloads of the appellate courts of this state.[2]

## II. ASSIGNMENTS OF ERROR

McLeod assigns, restated, consolidated, and renumbered, that the district court erred in (1) ordering the State to respond to his postconviction motion and allowing the State to present evidence on the issue of whether he was entitled to an evidentiary hearing, (2) denying him postconviction relief without an evidentiary hearing, and (3) failing to appoint him counsel.

## III. STANDARD OF REVIEW

[1,2] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. When such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.[3] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[4]

## IV. ANALYSIS

### 1. Postconviction Procedure

[3] McLeod's first assignment of error challenges the procedure utilized by the district court in determining, without an evidentiary hearing, that he was not entitled to postconviction

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[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[3] *State v. Hudson*, 270 Neb. 752, 708 N.W.2d 602 (2005); *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[4] *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

relief. Under the Nebraska Postconviction Act,[5] the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.[6] We examine such procedures for abuse of discretion, which exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[7]

On the day after McLeod filed his verified motion for postconviction relief requesting an evidentiary hearing and a motion for appointment of counsel, the district court entered an order in which it ordered the State to file a written response to the postconviction motion and deferred ruling on the motion for appointment of counsel until it had made a determination as to whether an evidentiary hearing was required. The State filed a response in which it moved to deny an evidentiary hearing on the ground that the files and records showed that McLeod was not entitled to the relief sought in his motion. McLeod filed an objection to the procedure utilized by the court in requiring the State to respond to his motion, and he moved to recuse the district judge.

The district court conducted a hearing on McLeod's procedural objection and motion to recuse and the State's motion to deny an evidentiary hearing on the postconviction claim. McLeod participated in the hearing by telephone. The court overruled McLeod's objection and motion and then received two exhibits offered by the State: the bill of exceptions and judge's minutes from McLeod's 1999 plea and sentencing proceedings. At the close of the hearing, the court took the matter under submission and later entered a written order denying postconviction relief.

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[5] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995).

[6] *State v. Dean, supra* note 4.

[7] *Id.*; *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

The procedure followed by the district court in this case is similar to that which we upheld in *State v. Dean*.[8] There, we noted that it was not unusual for a court to conduct a hearing to determine which files and records it may examine before determining whether to grant an evidentiary hearing on a motion for postconviction relief and that the procedure did not deprive the prisoner of a substantial right. We conclude, as we did in *Dean*, that the district court did not abuse its discretion with respect to procedures it utilized for reviewing files and records of McLeod's conviction and sentence.

### 2. Denial of Postconviction Relief

In his motion for postconviction relief, McLeod alleged that he was denied rights secured by the 6th and 14th amendments to the U.S. Constitution and Neb. Const. art. I, § 11, because his counsel was ineffective in advising him regarding his plea and in representing him on appeal from his conviction and sentence. We note that McLeod was represented by the same lawyer at the time of his plea and on direct appeal, and accordingly, this postconviction proceeding was his first opportunity to assert claims of ineffective assistance of counsel.[9]

[4-6] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[10] Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance

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[8] *State v. Dean*, *supra* note 4.

[9] See *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002).

[10] *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006).

of counsel.[11] When a conviction is based upon a guilty plea or a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.[12]

Given that relief was denied without an evidentiary hearing, we must determine whether McLeod alleged facts which support his claim that he was denied effective assistance of counsel; and if so, whether the files and records affirmatively show that he is entitled to no relief.[13]

(a) Inducement of Plea

McLeod alleged in his postconviction motion that his counsel was ineffective "for having induce [sic] [McLeod] to accept the plea agreement by assuring him that 'more than likely you'll be released before age forty', all the while knowing that [McLeod] would be given a life sentence if he plead [sic] to the charge of Murder in the First Degree." McLeod further alleged that his attorney advised him that if he were to take responsibility for his actions and show remorse, "'Someday, they'll see your case and take into account your age, nature of the crime and circumstances that lead [sic] to this grave tragedy.'" McLeod alleged that this led him to believe that he would in fact be sentenced to a term of years and that had he understood the reality of his situation, he would have refused to plead and insisted upon a trial.

As reflected in the record of the plea hearing, McLeod specifically denied that any promises had been made to induce his plea and that he was not subjected to any threats, pressure, or coercion. He also expressed his understanding that life imprisonment was the only sentence which could be imposed by the court. The statements which McLeod now attributes to his lawyer do not constitute a basis for postconviction relief. At most,

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[11] See, *State v. Barnes*, *supra* note 10; *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

[12] See *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

[13] See, *State v. McHenry*, *supra* note 4; *State v. Dean*, *supra* note 4.

he has alleged that his lawyer advised him there was a chance of future clemency in the form of commutation, which was consistent with the court's statement at sentencing that McLeod would remain in prison for the rest of his natural life unless and until his sentence was commuted to a term of years by the Board of Pardons and that he would not be eligible for parole prior to any such commutation.

(b) Pending Motions

McLeod alleges that his counsel could not have made an adequate assessment of the proposed plea agreement without knowing the ultimate disposition of his pending motions to suppress a statement and to transfer his case to juvenile court. But he alleges no facts upon which to assess the merits of the motions, nor does he allege that the State's offer of a plea agreement would have remained open if counsel had insisted upon disposition of the motions before responding. The record clearly reflects McLeod's understanding that his right to obtain a disposition of the pending motions would be waived if the court accepted his plea and that he affirmatively chose to accept the plea agreement with that knowledge.

(c) Factual Basis for Plea

McLeod alleged that his counsel was ineffective in advising him to enter a plea to a charge for which there was no factual basis and in "failing to file a motion in arrest of judgment challenging the plea" as lacking a factual basis. At the sentencing hearing, the parties stipulated to the submission of a six-page narrative of the crime, which describes McLeod's involvement in the crime, as the factual basis for his plea. In response to questions from the court, McLeod indicated that he had read the document, that he did not wish to comment on its content, and that he still wished to enter a plea of no contest. The document disclosed that McLeod and two other individuals attempted to invade a residence in order to steal drugs. McLeod was armed with a .410 shotgun, and one of his accomplices was armed with a 12 gauge shotgun. McLeod admitted firing his .410 shotgun at the individual that was killed. A firearms examiner, however, noted that the pellets actually removed from the victim likely

came from the 12 gauge shotgun. Based on this, McLeod asserts that the factual basis showed he was guilty of aiding and abetting at best, but not guilty of first degree murder.

[7] McLeod alleged that this document established that he was merely an aider and abettor, and therefore could not have been found guilty of first degree murder. This claim lacks merit because the common-law distinction between principal and aider and abettor has been abolished in Nebraska; a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender.[14] The record reflects a factual basis for McLeod's plea, and his counsel could not be ineffective for failing to contend otherwise.

(d) Speedy Trial

McLeod alleged that his counsel was ineffective in failing to preserve his constitutional right to a speedy trial guaranteed by the Sixth Amendment to the U.S. Constitution. In support of this claim, he alleged that his plea occurred 11 months after his arrest and that although his counsel filed certain motions "which would have tolled this time for the prosecution," such motions "did little for [McLeod] and much for the prosecution." He alleged no facts to support this conclusion.

[8] Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.[15] None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant.[16] McLeod has not alleged facts to establish that he had a colorable claim of

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[14] *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004); Neb. Rev. Stat. § 28-206 (Reissue 1995).

[15] *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

[16] *Id.*

denial of his constitutional right to a speedy trial at the time he entered his plea. Defense counsel is not ineffective for failing to raise an argument that has no merit.[17] Moreover, the record clearly reflects that McLeod knowingly and voluntarily waived his right to trial when he entered his plea.

(e) Appeal

In his postconviction motion, McLeod alleged that his counsel was ineffective in "filing a frivolous appeal for excessive sentence, knowing that the only sentence that the court could impose for the charge of Murder in the First Degree was a life sentence." He alleged that counsel should have raised "the speedy trial issue" and "lack of [a] factual basis for the charge of Murder in the First Degree" in his appeal.

McLeod alleged no facts concerning his directions to or communications with his attorney regarding an appeal. McLeod's direct appeal was clearly without merit, but whether it was frivolous may depend upon whether McLeod directed his counsel to file it.[18] But even where defense counsel completely fails to file an appeal, the question of whether a defendant is prejudiced thereby often depends upon "evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal."[19] Here, there is no allegation that McLeod specifically requested or directed his attorney to appeal his conviction or sentence. For the reasons discussed above, McLeod's claims regarding speedy trial and lack of factual basis would not have constituted "nonfrivolous grounds for appeal." McLeod has not alleged facts to establish ineffective assistance of appellate counsel, and his conclusory allegations are refuted by the record.

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[17] *State v. McHenry, supra* note 4.

[18] See *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000).

[19] *Roe v. Flores-Ortega*, 528 U.S. 470, 485, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (cited and quoted in *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006)).

#### (f) Summary

Based upon our examination of the postconviction motion and the files and records of the underlying criminal proceeding, we conclude that the district court did not err in denying postconviction relief without conducting an evidentiary hearing.

### 3. Denial of Motion to Appoint Counsel

[9,10] McLeod asserts that the district court erred in failing to appoint him counsel so that he could conduct further discovery on his postconviction motion. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.[20] When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.[21] Based upon our conclusion that McLeod's postconviction motion and the files and records of his case do not present any justiciable issue with respect to postconviction relief, we conclude that the district court did not abuse its discretion in denying his motion for appointment of counsel.

## V. CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

Affirmed.

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[20] *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

[21] *Id.*

# DONNA EGGLESTON, SPECIAL ADMINISTRATOR OF THE LYDIA M. MULLIS ESTATE, APPELLANT AND CROSS-APPELLEE, V. ARDEITH L. KOVACICH, APPELLEE AND CROSS-APPELLANT.

742 N.W.2d 471

Filed December 7, 2007. No. S-06-684.

1. **Actions: Trusts: Equity.** An action to impose a constructive trust sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Trusts: Property: Title: Unjust Enrichment: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.
4. **Trusts: Property.** Intangible property and liquid assets such as stocks and bank and investment accounts may be held subject to a constructive trust.
5. **Trusts: Property: Title: Equity.** Regardless of the nature of the property upon which the constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
6. **Trusts: Statutes: Banks and Banking: Intent.** Neb. Rev. Stat. § 30-2719 (Reissue 1995) provides that extrinsic evidence of the depositor's intent as to what type of account was created is relevant only when the contract of deposit is not in substantially the form provided in § 30-2719(a). When the contract of deposit for an account is substantially in such form, the account will be treated as being the type of account designated on the form; if the contract of deposit is not in such form, then the depositor's intent is relevant to determine the type of account pursuant to § 30-2719(b).
7. **Fraud.** Constructive fraud generally arises from a breach of duty arising out of a fiduciary or confidential relationship.
8. **Fraud: Words and Phrases.** Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.
9. **Fraud: Intent.** Constructive fraud is implied by law from the nature of the transaction itself. The existence or nonexistence of an actual purpose to defraud does not enter as an essential factor in determining the question; the law regards the transaction as fraudulent per se.

10. ____: ____. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.
11. **Actions: Fraud: Proof.** In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.
12. **Principal and Agent: Joint Tenancy: Fraud: Proof. Intent.** In situations involving an attorney in fact, a prima facie case of constructive fraud is established if the plaintiff shows that the defendant held the principal's power of attorney and that the defendant, using the power of attorney, made a gift to himself or herself. A fiduciary's acquisition of a right of survivorship in property, even absent a present possessory interest, is generally sufficient to establish that a fiduciary has profited from a transaction. The burden of going forward under such circumstances falls upon the defendant to establish by clear and convincing evidence that the transaction was made pursuant to power expressly granted in the power of attorney document and made pursuant to the clear intent of the donor. The fiduciary bears the burden of proving the fairness of the transaction.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

Phillip G. Wright and Casey E. Miller, of Wright & Associates, for appellant.

Jeanette Stull, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

## I. NATURE OF CASE

Donna Eggleston, as special administrator of the estate of Lydia M. Mullis, appeals the order of the district court for Otoe County imposing a constructive trust on one bank account referred to as "account 547-745" but not on any other account owned by Mullis at her death. Eggleston asserts that the court erred in failing to impose a constructive trust on all of Mullis' assets. Ardeith L. Kovacich cross-appeals and asserts that the court erred in imposing a constructive trust on

account 547-745. For reasons that differ from those of the district court, we affirm.

## II. STATEMENT OF FACTS

Mullis died in September 2000. She was survived by two daughters, Kovacich and Eggleston.

In 1999, Mullis met with an attorney to discuss estate planning. As a result of such planning, Mullis established a revocable trust into which she transferred a farm she owned near Cook, Nebraska. She also executed a will which provided that all assets she owned at death would become property of the trust. The terms of the trust provided that after Mullis' death, the trust would be divided equally between Kovacich and Eggleston. The trust document named Kovacich as the first successor trustee and Eggleston as the second successor trustee. Mullis' will named Kovacich as the personal representative and Eggleston as the alternate personal representative in the event Kovacich was unable or unwilling to serve. At the time Mullis executed the trust documents and the will, she also executed a durable power of attorney naming Kovacich as her attorney in fact.

Shortly after the documents noted above were signed, Mullis and Kovacich went to the Syracuse, Nebraska, branch of the First National Bank of Unadilla, now known as Countryside Bank (hereinafter the Bank), to open an account. The account was numbered 351-213 by the Bank. The signature card, sometimes referred to as the "contract of deposit," for account 351-213 named Mullis and Kovacich as owners of the account. The signature card included a section titled "Ownership of Account" which designated the account as a "Multiple-Party Account" and a section titled "Rights at Death" which designated the account as a "Multiple-Party Account With Right of Survivorship." A section of the signature card titled "Agency (Power of Attorney) Designation" was left blank. The signature card was signed by both Mullis and Kovacich.

On August 24, 2000, another account, numbered 547-745, was opened at the Bank. The signature card for account 547-745 named Mullis and Kovacich as owners of the account. The signature card for account 547-745 included a section

titled "Ownership of Account" which designated the account as a "Multiple-Party Account" and was initialed by Kovacich but not by Mullis. In the section titled "Rights at Death," the account was designated as a "Multiple-Party Account With Right of Survivorship" and was initialed by Kovacich but not by Mullis. A section of the signature card titled "Agency (Power of Attorney) Designation" was left blank. The signature portion of the card for account 547-745 was not signed by Mullis. Instead, beneath Mullis' typed name, Kovacich signed her own name followed by the designation "POA" which the parties and the district court have assumed without contradiction stands for "power of attorney."

Mullis died a few weeks after account 547-745 was opened. The inheritance tax worksheet prepared for her estate reported various accounts and bonds jointly owned by Mullis and Kovacich which totaled $148,650.72. Among the accounts were 351-213, which had a value of $13,889.66 at the date of Mullis' death, and 547-745, which had a value of $42,954.96 at the date of Mullis' death. The worksheet also showed that at her death, Mullis owned a farm valued at $60,000 and personal property valued at $3,000. The worksheet showed that the jointly owned accounts and bonds were to be distributed to Kovacich and that the farm and personal property were to be distributed evenly between Kovacich and Eggleston.

On October 1, 2003, Eggleston filed a complaint against Kovacich in district court. Eggleston had been appointed by the county court of Otoe County to act as special administrator of the estate. Eggleston alleged two causes of action. The first was for conversion. Eggleston alleged that Kovacich had used her position as Mullis' attorney in fact to convert to her own use various assets, including accounts 351-213 and 547-745 and the bonds that were used as the initial deposit for account 547-745. Eggleston alleged that the bonds had been held in the names of Mullis and Eggleston. As her second cause of action for imposition of a constructive trust, Eggleston alleged that the accounts and bond proceeds were placed in Kovacich's name under a constructive trust to be used for the benefit of Mullis during her lifetime and that at Mullis' death, such funds were to be divided equally between Kovacich and Eggleston according to the terms

of the trust. Eggleston sought an accounting of such funds and an order directing Kovacich to turn the funds over to the estate for proper distribution.

Following trial, the district court entered an order dated December 5, 2005. The court concluded that with respect to all accounts and bonds other than accounts 351-213 and 547-745, there was no evidence to suggest that Mullis intended anything other than that the accounts and bonds were to belong to Kovacich upon Mullis' death.

With respect to account 351-213, the court determined that the evidence, including testimony of the Bank employee who assisted in opening the account, indicated that the decision to designate this account as a joint account with Kovacich was Mullis' decision without undue influence by Kovacich. The court concluded that the evidence failed to show conversion on the part of Kovacich. The court also concluded that the evidence did not support a finding that account 351-213 was set up as an account "for the convenience of" Mullis.

With respect to account 547-745, the court found the evidence to be "more troublesome." The court in its order found the following: In the summer of 2000, Mullis was taken to live with Kovacich in Rock Springs, Wyoming, due to Mullis' declining health and her need for help in dealing with her affairs. In August 2000, Mullis returned to Nebraska to move into a nursing home in Syracuse. Mullis was concerned with the costs of the nursing home and decided to open a new account to take care of nursing home expenses and related finances. On August 24, the same day Mullis moved into the nursing home, account 547-745 was opened. The signature card for account 547-745 was not signed by Mullis but was signed by Kovacich pursuant to the power of attorney. The funds in the account came from two sources—U.S. bonds and a Commercial Federal Bank account. The Commercial Federal Bank account was jointly owned by Mullis and Kovacich and amounted to $25,248.08. The U.S. bonds that were liquidated to fund account 547-745 were held in the names of Mullis and Eggleston. There were also U.S. bonds held in the names of Mullis and Kovacich, but such bonds were not liquidated to fund account 547-745. Kovacich testified at trial that account

547-745 was set up the way it was "[b]ecause that's the procedure as far as being on an account with somebody in case they [sic] become disabled or something that you can take care of their [sic] financial things."

The court concluded in its order that when account 547-745 was set up, it was not Mullis' intention that Kovacich be entitled to all of the funds in the account at her death. The court in its order noted Kovacich's argument based on statute to the effect that Mullis' intention was not relevant because the account was set up as a multiple-party account with right of survivorship. Kovacich argued that under current Nebraska statutes, such an account belongs to the surviving party and that the intention of the party who created the account is not relevant. Kovacich noted that current Neb. Rev. Stat. § 30-2723(a) (Reissue 1995) provides that "on death of a party sums in deposit in a multiple-party account belong to the surviving party or parties." Kovacich contrasted the current statute to former Neb. Rev. Stat. § 30-2704(a) (Reissue 1989) which provided that sums in a joint account belonged to the surviving party or parties "unless there is clear and convincing evidence of a different intention at the time the account is created." Kovacich argued at trial and on appeal that because the current statute omits the language regarding the decedent's intention, the Legislature intended to eliminate consideration of the intention of the person creating the account. The court rejected Kovacich's arguments and concluded that under the current statutes, a court would be justified in receiving extrinsic evidence if it found that the account was opened solely for the convenience of the party who supplied the funds and was not intended as a gift or death benefit for the other party. The court concluded that account 547-745 was set up as a "convenience account" to take care of Mullis' financial needs while she was in the nursing home and was not intended as a gift or death benefit to Kovacich.

In view of its conclusions, the district court imposed a constructive trust on account 547-745 requiring Kovacich to hold Eggleston's interest in the account as trustee for the benefit of Eggleston as beneficiary and to account for all profits Kovacich received from the account. The court entered judgment in favor of Kovacich with regard to all accounts and bonds other than

account 547-745, and dismissed Eggleston's complaint with regard to such other accounts and bonds. The court reserved the issue of an accounting with regard to account 547-745.

A hearing on the accounting was held May 8, 2006. In an order entered May 26, the court noted Kovacich's argument that the funds held in the account should be prorated based on the sources of funds used to establish the account. The two sources were U.S. bonds owned by Mullis and Eggleston in the amount of $17,637.44 and a Commercial Federal Bank account owned by Mullis and Kovacich in the amount of $25,248.08. The court rejected Kovacich's argument and determined that Mullis' intention was to establish a new account and that the sources lost their identities when they were liquidated and put into the new account. The court determined that because account 547-745 was a "convenience account," the account should have been an asset of Mullis' estate. The court determined that the balance of account 547-745 at the date of Mullis' death was $42,954.96, and the court calculated interest of $9,770.70 from the date of death until the date of the order. The court therefore entered judgment against Kovacich and ordered her to pay $52,725.66 to Eggleston, as special administrator of the estate, for distribution from the estate.

Eggleston appeals, and Kovacich cross-appeals.

## III. ASSIGNMENTS OF ERROR

In her appeal, Eggleston asserts that the district court erred in failing to impose a constructive trust on all of Mullis' assets, including account 351-213 and the other accounts and bonds. In her cross-appeal, Kovacich asserts that the court erred in imposing a constructive trust on account 547-745.

## IV. STANDARDS OF REVIEW

[1,2] An action to impose a constructive trust sounds in equity. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one

version of the facts rather than another. *Ferer v. Aaron Ferer & Sons Co.*, 273 Neb. 701, 732 N.W.2d 667 (2007).

## V. ANALYSIS

The district court imposed a constructive trust on account 547-745, but did not impose a constructive trust on account 351-213 or any of the other accounts or bonds. In her appeal, Eggleston asserts that the court erred in failing to impose a constructive trust on all of the accounts and bonds, including account 351-213; in her cross-appeal, Kovacich asserts that the court erred in imposing the constructive trust on account 547-745. For the reasons discussed below, which differ in some respects from those of the district court, we conclude that because Eggleston established constructive fraud by virtue of Kovacich's use of her power of attorney to designate account 547-745 as a multiple-party account with right of survivorship, the court did not err in imposing a constructive trust on account 547-745. We further conclude that the district court did not err in declining to impose a constructive trust on account 351-213 and the other assets. In reaching these conclusions, we first analyze the cross-appeal and thereafter consider the appeal.

### 1. Standards for Imposing Constructive Trusts

[3-5] In view of the contentions of the parties, we review the standards applicable to constructive trusts. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004). Intangible property and liquid assets such as stocks and bank and investment accounts may be held subject to a constructive trust. *Id.* Regardless of the nature of the property upon which the constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *Id.*

Applying these standards in the present case, we determine that if Eggleston established that Kovacich obtained title to the accounts at issue by some form of actual or constructive fraud, misrepresentation, or abuse of an influential or confidential relationship such as her position as Mullis' attorney in fact, then a constructive trust would be an appropriate form of equitable relief with respect to the accounts at issue.

### 2. Cross-Appeal: District Court Did Not Err in Imposing a Constructive Trust on Account 547-745

#### (a) Cross-Appeal: District Court Erred in Concluding That Account 547-745 Was a Convenience Account and not a Multiple-Party Account With Right of Survivorship and Erred in Considering Extrinsic Evidence to Determine the Nature of the Account

At issue in this appeal is the proper characterization and treatment of accounts under article 27 of the Nebraska Probate Code contained in chapter 30 of the Nebraska Revised Statutes. In this connection, we examine under what circumstances a court may look to extrinsic evidence to determine the nature of an account. In the present case, we conclude that because the contract of deposit for account 547-745 contained provisions substantially in the form provided in Neb. Rev. Stat. § 30-2719(a) (Reissue 1995), the court should have determined from the face of the contract of deposit that account 547-745 was a multiple-party account with right of survivorship. The district court should not have looked to extrinsic evidence to determine the nature of the account and erred in concluding that account 547-745 was a "convenience account."

Under § 30-2719(a), a "contract of deposit that contains provisions in substantially the form provided in this subsection establishes the type of account provided, and the account is governed by the provisions of sections 30-2716 to 30-2733 applicable to an account of that type." Section 30-2719(a) contains a sample account form providing for designation of various features including ownership ("Single-Party Account" or "Multiple-Party Account"); rights at death (including, inter alia, "Right of Survivorship," "POD (Pay on Death) Designation," or single-party account passing at death as part of party's

estate); and "Agency (Power of Attorney) Designation" (allowing a party to designate an agent to make account transactions for the party but not have ownership or rights at death unless otherwise designated). Section 30-2719(b) provides that a "contract of deposit that does not contain provisions in substantially the form provided in subsection (a) of this section is governed by the provisions of sections 30-2716 to 30-2733 applicable to the type of account that most nearly conforms to the depositor's intent."

[6] We read § 30-2719 as providing that extrinsic evidence of the depositor's intent as to what type of account was created is relevant only when the contract of deposit is not in substantially the form provided in § 30-2719(a). When the contract of deposit for an account is substantially in such form, the account will be treated as being the type of account designated on the form; if the contract of deposit is not in such form, then the depositor's intent is relevant to determine the type of account pursuant to § 30-2719(b).

As noted by Kovacich, prior to the 1993 revisions of the Nebraska Probate Code, § 30-2704(a) provided that "[s]ums remaining on deposit at the death of the party to a joint account belong to the surviving party or parties as against the estate of the decedent *unless there is clear and convincing evidence of a different intention at the time the account is created.*" (Emphasis supplied.) Kovacich notes that the current statute omits the exception regarding a different intention. Further, current § 30-2723 merely states that "on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties."

Under the prior statute, a court could examine extrinsic evidence to determine whether "the intention at creation of [a joint] account was other than the intention that all funds belong to the surviving party or parties to the account." *In re Estate of Lienemann*, 222 Neb. 169, 175, 382 N.W.2d 595, 600 (1986). Thus, under the former statute, a court could, as the court did in this case, determine that a joint account, known under the current statutes as a "multiple-party account," was opened solely as a convenience to allow the secondary owner to make transactions on behalf of the principal owner without there having

been an intention to give the secondary owner rights to the account at the principal owner's death.

The current statutes provide a mechanism for creation of an account wherein an agent may be permitted to write checks, but the agent would not stand to inherit the funds in the account, except by virtue of another vehicle for inheritance other than the form of the account. Under the current statutes, and consistent with the form contained in § 30-2719(a), an account may be set up as a single-party account with an agency designation. This structure for an agency account allows the agent to make account transactions without having an ownership interest or rights at death. See § 30-2719 and Neb. Rev. Stat. § 30-2720 (Reissue 1995). Under the current statutes, account holders have the opportunity to set up an account with an agency designation in order to have the desired features of a "convenience account." The purpose of the form provided under § 30-2719(a) appears to be to make clear account holders' intentions regarding issues of ownership, rights at death, and agency designation and, therefore, to make unnecessary an examination of extrinsic evidence to determine such intentions.

We note further that article 27 of the Nebraska Probate Code is based on the Uniform Probate Code's revised article VI. The comment to Uniform Probate Code § 6-212 (the counterpart of § 30-2723) states that the purpose of the drafters was

> to permit a court to implement the intentions of parties to a joint account governed by Section 6-204(b) [the counterpart of § 30-2719(b)] if it finds that the account was opened solely for the convenience of a party who supplied all funds reflected by the account and intended no present gift or death benefit for the other party.

Unif. Probate Code § 6-212, comment, 8 U.L.A. 441 (1998). We believe this comment is consistent with our reading above that intention is relevant only when the contract of deposit does not substantially follow the form set forth in § 30-2719(a) and is therefore governed by § 30-2719(b), the latter of which permits an assessment of "the type of account that most nearly conforms to the depositor's intent." When the contract of deposit is not in the form outlined in § 30-2719(a), a court may look to extrinsic evidence to determine whether the intention

of the depositor was to set up an account formerly commonly referred to as a "convenience account" but perhaps more aptly now referred to as an "agency account." See §§ 30-2719 and 30-2720. See, also, Introducer's Statement of Intent, L.B. 250, Judiciary Committee, 93d Leg., 1st Sess. (Mar. 10, 1993). However, if the contract of deposit is in the form provided in § 30-2719(a), then a court looks only to the contract of deposit and treats the account as the type of account designated in the contract of deposit.

The contract of deposit for account 547-745 in the present case was substantially in the form provided in § 30-2719(a). The signature card contained provisions regarding ownership, rights at death, and agency designation. Because the signature card in account 547-745 was in such form, under § 30-2719(a), the account was the type indicated on the card and the district court should not have looked to extrinsic evidence of intent to determine the type of account. The signature card indicated that account 547-745 was a multiple-party account with a right of survivorship. Sections of the card which could have been used to designate the account as an agency account were left blank.

We conclude that the district court erred in this case when it looked to extrinsic evidence to determine the nature of account 547-745. The district court further erred when it concluded, contrary to the designation in the signature card, that account 547-745 was a "convenience account" that at death would pass as part of Mullis' estate, rather that a multiple-party account with right of survivorship. To the extent that the district court rested its decision to impose a constructive trust based on its erroneous determination that account 547-745 was a "convenience account," such reasoning was in error. The district court erred when it failed to conclude that account 547-745 was a multiple-party account with right of survivorship.

### (b) Cross-Appeal: District Court Did Not Err in Imposing Constructive Trust on Account 547-745 Because Eggleston Established Constructive Fraud by Kovacich

Although the court erred in reasoning that a constructive trust should be imposed on account 547-745 because it was a

"convenience account," we nevertheless conclude that it was proper to impose a constructive trust because Eggleston established constructive fraud with respect to account 547-745. As noted above, a constructive trust may be imposed when it is found that property was obtained "by fraud, misrepresentation, or an abuse of an influential or confidential relationship." *Trieweiler v. Sears*, 268 Neb. 952, 978, 689 N.W.2d 807, 834 (2004).

[7-10] In prior cases, we have noted that fraud may include constructive fraud and that abuse of an influential or confidential relationship may include using a power of attorney to make a gift to oneself. Constructive fraud generally arises from a breach of duty arising out of a fiduciary or confidential relationship. *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003). Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. *Id.* Constructive fraud is implied by law from the nature of the transaction itself. The existence or nonexistence of an actual purpose to defraud does not enter as an essential factor in determining the question; the law regards the transaction as fraudulent per se. *Id.* Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud. *Id.*

[11,12] In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud. *Crosby v. Luehrs, supra.* In situations involving an attorney in fact, we have determined that a prima facie case of constructive fraud is established if the plaintiff shows that the defendant held the principal's power of attorney and that the defendant, using the power of attorney, made a gift to himself or herself. *Id.* A fiduciary's acquisition of a right of survivorship in property, even absent a present possessory

interest, is generally sufficient to establish that a fiduciary has profited from a transaction. *Id.* The burden of going forward under such circumstances falls upon the defendant to establish by clear and convincing evidence that the transaction was made pursuant to power expressly granted in the power of attorney document and made pursuant to the clear intent of the donor. The fiduciary bears the burden of proving the fairness of the transaction. *Id.*

In the present case, Eggleston established that Kovacich held Mullis' power of attorney and that Kovacich, using the power of attorney, made a gift to herself via account 547-745. As in *Crosby v. Luehrs, supra*, Kovacich's acquisition of a right of survivorship in account 547-745 was sufficient to establish that she profited by opening account 547-745 using the power of attorney. Eggleston therefore established a prima facie case of constructive fraud.

After Eggleston established a prima facie case, the burden fell upon Kovacich to establish by clear and convincing evidence that the designation of account 547-745 as a multiple-party account with right of survivorship was (1) made pursuant to power expressly granted in the power of attorney document and (2) made pursuant to the clear intent of Mullis. With respect to the first requirement, the power of attorney document executed by Mullis named Kovacich as attorney in fact and stated that the attorney in fact had power to, inter alia, "make gifts to any person, including my attorney, if my attorney deems such gifts wise for tax and/or estate planning purposes, provided, however, that my attorney shall not make gifts to my attorney's creditors, my attorney's estate, or the creditor's [sic] of my attorney's estate." Although it is arguable that Kovacich established that she was authorized to make gifts to herself, we need not resolve this issue because Kovacich failed to establish that the gift of a right of survivorship in account 547-745 was made pursuant to the clear intent of Mullis. To the contrary, at trial, Kovacich testified that account 547-745 was established "[b]ecause that's the procedure as far as being on an account with somebody in case they [sic] become disabled or something that you can take care of their [sic] financial things." Thus, the evidence, including Kovacich's own testimony, indicated that Mullis intended the account to be

an agency account in which Kovacich had the power to make transactions but did not have an ownership interest.

Although extrinsic evidence of Mullis' intention regarding account 547-745 was not relevant to the question considered above regarding the type of account, the evidence is relevant to determining the existence of constructive fraud. In determining above that account 547-745 was a multiple-party account with right of survivorship, extrinsic evidence of intention was not relevant because the contract of deposit was in substantially the form provided in § 30-2719(a). However, in connection with the issue of constructive fraud, the question is not the type of treatment to be accorded account 547-745; instead, the question is whether Kovacich, using her power of attorney, designated account 547-745 as the type of account Mullis intended it to be.

Eggleston established a prima facie case of constructive fraud, and Kovacich failed to establish that Mullis' clear intent was to create the account as a multiple-party account with right of survivorship. Imposing a constructive trust on account 547-745 was a proper remedy for such constructive fraud, and we therefore conclude that the district court did not err in imposing a constructive trust on account 547-745.

### 3. Appeal: District Court Did Not Err in Declining to Impose a Constructive Trust on Account 351-213 and Other Assets

In her appeal, Eggleston argues that the court erred in failing to impose a constructive trust on account 351-213 and the other accounts and bonds. We conclude that the district court did not err in determining that account 351-213 and the other accounts and bonds were designated with right of survivorship to Kovacich. We further conclude that the district court did not err in determining that the evidence did not establish that Kovacich used the power of attorney to open account 351-213 or any other accounts and that therefore, Eggleston has not established constructive fraud with respect to such accounts. We therefore conclude that the court did not err when it declined to impose a constructive trust on account 351-213 and the other accounts and bonds.

With respect to account 351-213, the contract of deposit was substantially in the form set forth in § 30-2719(a). The signature card indicated that the account was a multiple-party account owned by Mullis and Kovacich with right of survivorship. The signature card was signed by both Mullis and Kovacich. The section in which an agency designation could be made was left blank. On its face, account 351-213 was a multiple-party account with right of survivorship. See § 30-2719(a) and (b). With regard to the remaining accounts and bonds, the evidence indicates that the accounts and bonds were designated as giving a right of survivorship to Kovacich and that the related contracts of deposit were either substantially in the form set forth in § 30-2719(a) or, if such contracts of deposit were not in such form, that Eggleston failed to provide evidence pursuant to § 30-2719(b) that Mullis' intention was anything other than that Kovacich should have a right of survivorship. We therefore determine that account 351-213 and the other accounts and bonds provided a right of survivorship to Kovacich.

With respect to constructive fraud, we note that unlike the signature card for account 547-745 which Kovacich signed for Mullis using the power of attorney, the signature card for account 351-213 was signed by Mullis herself. Kovacich also signed as an owner, but she did not use the power of attorney to sign the card on Mullis' behalf. There is no indication that Kovacich opened any of the other accounts or bonds using the power of attorney. Because Kovacich did not use the power of attorney to open account 351-213 or the other accounts and bonds, Eggleston did not establish that Kovacich used her power of attorney to make a gift to herself with respect to such accounts. Eggleston therefore did not establish a prima facie case of constructive fraud with respect to such accounts. Furthermore, Eggleston did not establish constructive fraud in any other sense with respect to account 351-213 or the other accounts and bonds, nor did she establish conversion.

The evidence shows that Kovacich had a right of survivorship with respect to account 351-213 and the other accounts and bonds, and Eggleston did not establish constructive fraud with respect to account 351-213 and the other assets. We therefore conclude that the district court did not err when it declined to

impose a constructive trust on account 351-213 and the other accounts and bonds.

## VI. CONCLUSION

Because Eggleston established constructive fraud with respect to account 547-745 but failed to establish constructive fraud with respect to account 351-213 and the other accounts and bonds, we conclude that the district court did not err in imposing a constructive trust on account 547-745 but not on account 351-213 and the other assets. Although our reasoning differs from that of the district court, we affirm the district court's order.

AFFIRMED.

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COREY BRETT HEINZE, APPELLANT, V.
TAYLOR HEINZE, APPELLEE.
742 N.W.2d 465

Filed December 7, 2007. No. S-06-722.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
2. **Jurisdiction: States.** The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states.
3. ____: ____. An actual conflict exists when a legal issue is resolved differently under the law of two states.
4. ____: ____. When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.
5. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed.

Vincent M. Powers, of Vincent M. Powers & Associates, and Steven B. Fillman, of Fillman Law Offices, for appellant.

Timothy J. Thalken and Rex A. Rezac, of Fraser Stryker, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

## NATURE OF CASE

While riding in an automobile driven by his wife, Corey Brett Heinze was injured in an accident in Colorado. Corey and his wife, Taylor Heinze, were residents of York, Nebraska, and Corey sued Taylor in the York County District Court for damages as a result of the accident. The court concluded that Nebraska's guest statute barred Corey's action and granted summary judgment in favor of Taylor. Corey timely appealed. The issue is whether Nebraska or Colorado law applies to the accident above described.

## SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *State ex rel. Wagner v. Amwest Surety Ins. Co., ante* p. 110, 738 N.W.2d 805 (2007).

## FACTS

In December 2002, Corey and Taylor traveled to Colorado to visit Taylor's family. On December 22, Corey rode as a passenger when Taylor drove her mother's automobile to the Denver airport to pick up other family members. She hit loose gravel on the shoulder of an off ramp and lost control of the automobile, which rolled into a ditch. Corey was ejected, and he sustained injuries to his head, spine, spleen, and right wrist.

When Corey sued Taylor, he alleged that the laws of Colorado applied because the accident occurred in the State of Colorado. Taylor alleged that the action was barred by Nebraska's guest statute, Neb. Rev. Stat. § 25-21,237 (Reissue 1995), because Corey and Taylor were married at the time of the accident. They were divorced in December 2004.

The district court concluded that Nebraska law applied because Nebraska had a more significant relationship to the parties under the guest statute and was the jurisdiction in which the relationship between the parties was centered. Thus, the court determined that § 25-21,237 barred Corey's claim. The

district court found that there were no genuine issues of material fact and that Taylor was entitled to judgment as a matter of law. It dismissed the cause with prejudice and taxed the costs to Corey.

## ASSIGNMENTS OF ERROR

Corey assigns the following errors: The district court erred (1) in applying the law of Nebraska to an accident that occurred in Colorado; (2) in ignoring Nebraska precedent and applying the Restatement (Second) of Conflict of Laws in determining that Colorado law did not apply to the facts of this case; (3) in applying the Restatement (Second) of Conflict of Laws § 169 (1971); (4) in determining that Nebraska, rather than Colorado, had more significant contacts with the occurrence and the parties; and (5) in entering summary judgment in favor of Taylor and dismissing Corey's complaint.

## ANALYSIS

The issue for our determination is whether Nebraska's guest statute should be applied to an accident involving Nebraska residents that occurred in Colorado. The district court concluded that Nebraska law should be applied and that our guest statute barred Corey's recovery.

[2,3] The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states. *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005). An actual conflict exists when a legal issue is resolved differently under the law of two states. *Id.* A conflict-of-law issue is presented in this case because Nebraska has a guest statute, § 25-21,237, and Colorado has repealed its guest statute, see *White v. Hansen*, 837 P.2d 1229 (Colo. 1992).

The Nebraska guest statute provides in relevant part:

> The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person related to such owner or operator as spouse or within the second degree of consanguinity or affinity who is riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by (1) the driver of such

> motor vehicle being under the influence of intoxicating liquor or (2) the gross negligence of the owner or operator in the operation of such motor vehicle.

§ 25-21,237.

[4] When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law. *Johnson, supra.* When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *State ex rel. Wagner v. Amwest Surety Ins. Co., ante* p. 110, 738 N.W.2d 805 (2007). In this case, there are no factual disputes. The parties agree that Corey and Taylor were residents of Nebraska, that the accident occurred in Colorado, and that the automobile involved was owned by a Colorado resident and licensed in Colorado.

This court has not specifically determined whether Nebraska's guest statute should be applied when a motor vehicle accident has occurred in another state involving Nebraska residents who are within the degree of consanguinity set forth in § 25-21,237. We have, however, considered cases that raised a conflict-of-law question in other contexts and in which the guest statute was not implicated.

In *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), *disapproved on other grounds, Johnson, supra*, the passenger (a resident of Nebraska) brought an action in Nebraska for personal injuries that resulted from an automobile accident which occurred in Colorado in an automobile owned and driven by the passenger's stepson. The passenger argued that he should be entitled to recover from the Colorado driver as though the tort liability law of Nebraska applied to the accident in Colorado and that if he could not do so, then he should be allowed to recover under the uninsured motorist coverage of his own automobile insurance policy.

We cited the Restatement (Second) of Conflict of Laws § 146, comment *d.* (1971), and stated that "in virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that conduct and in determining whether it is tortious in character, and whether the interest affected is entitled to legal protection." *Crossley*, 198 Neb. at 30, 251 N.W.2d at 386. The basis of the cause in

*Crossley* was an insurance contract rather than an action in tort. This court was asked to determine which state's laws would be applied to determine insurance coverage.

In another insurance case, the action again arose from a motor vehicle accident that occurred in Colorado involving a Nebraska resident. *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005). The injured driver sought additional benefits from his insurer and the insurer of the car he was driving. In addressing the conflict of law between Nebraska and Colorado relating to uninsured motorist benefits, we reaffirmed the holding in *Crossley* that under the Restatement, *supra*, § 146, Colorado's no-fault law governed the threshold issue of the tort-feasor's liability.

The significance of *Crossley* and *Johnson* as they are applied to the case at bar is that this court recognized the application of § 146 to resolve conflict of laws involving tort liability.

The Restatement provides:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, *unless, with respect to the particular issue, some other state has a more significant relationship* under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

§ 146 at 430 (emphasis supplied).

Thus, under the Restatement, the law of the site of the injury is usually applied to determine liability, except where another state has a more significant relationship on a particular issue. The fact that Nebraska has a guest statute provides this state with a more significant relationship to the parties when they are residents of Nebraska.

This court applied the Restatement's more-significant-relationship test to a tort case in *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002). A hotel patron from Nebraska was stuck by a needle in a California hotel room. An action was brought in Nebraska by the Nebraska resident. The defendant alleged the case was governed by the substantive law of California. The action centered around parasitic damages for fear of contracting a disease. The trial court determined that

any damage attributable to the fear of contracting a disease was controlled by Nebraska law.

We stated: "In choice-of-law determinations for personal injury claims, we have adopted Restatement (Second) of Conflict of Laws § 146 (1971)." *Malena*, 264 Neb. at 766, 651 N.W.2d at 856. We noted that § 146 is the starting point for any choice-of-law analysis and that under § 146, the presumption is that the local law of the state where the injury occurred determines the rights and liabilities of the parties *unless some other state has a more significant relationship to the parties and the occurrence with respect to a particular issue.* We concluded that in that case, California had the more significant relationship to the parties and the occurrence because the injury occurred there, the conduct causing the injury occurred there, the defendant's place of business was there, and the relationship between the parties was there. The only contact with Nebraska was the domicile of the hotel patron. Again, the guest statute was not implicated.

The Restatement (Second) of Conflict of Laws § 145 (1971) sets forth the "'most significant relationship'" test used for determining the applicable law for specific tort claim issues. See *Malena*, 264 Neb. at 767, 651 N.W.2d at 856.

Section 145 at 414 states:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The Restatement notes that in cases involving a guest passenger, the local law of the common domicile may be applied:

> [T]he circumstances under which a guest passenger has a right of action against the driver of an automobile for injuries suffered as a result of the latter's negligence may be determined by the local law of their common domicil[e], if at least this is the state from which they departed on their trip and that to which they intended to return, rather than by the local law of the state where the injury occurred.

§ 145, comment *d.* at 418.

Following this approach, the record supports a conclusion that Nebraska law should apply in this case. Corey and Taylor were both residents of Nebraska at the time of the accident. Their trip to Colorado began in Nebraska and was intended to end in Nebraska. They lived and worked in Nebraska, and their relationship was centered in Nebraska at the time. The parties were married at the time of the accident. Thus, this state's law should govern whether Corey may recover for his injuries.

Although a guest statute is distinct from a statute providing immunity for family members, the Restatement (Second) of Conflict of Laws § 169 at 506 (1971) provides additional guidance: "(1) The law selected by application of the rule of § 145 determines whether one member of a family is immune from tort liability to another member of the family. (2) The applicable law will usually be the local law of the state of the parties' domicil[e]."

The Restatement provides a rationale for cases involving family members:

> *b. Rationale.* An immunity from tort liability is commonly possessed in varying circumstances by one spouse against the other spouse and by a parent against a minor child. Reasons frequently advanced to explain the existence of such immunity are the common law doctrine of the legal identity of the spouses, the desire to foster and preserve marital harmony and parental discipline, and the desire to protect insurance companies from false claims. Whatever

> the true explanation, the state of the parties' domicil[e] will almost always be the state of dominant interest, and, if so, its local law should be applied to determine whether there is immunity in the particular case.

§ 169, comment *b.* at 506-07.

Section 169 suggests that in cases involving family members, the state where the parties are domiciled has a more significant relationship to the action and will govern over the law of the state where the tort occurred. We agree.

The contacts identified in the Restatement (Second) of Conflict of Laws § 145 (1971) include the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile or residence of the parties, and the place where the relationship, if any, between the parties is centered. Section 145 advises that the contacts are to be evaluated according to their relative importance. It does not suggest that each contact should be weighed evenly.

The district court found that Nebraska law applied because this state had a more significant relationship to the parties under the guest statute and Nebraska was the jurisdiction in which the relationship between the parties was centered. The court concluded that under § 25-21,237, Corey's claim was barred. By enacting the guest statute, the Legislature evidenced a concern about the possibility of fraud and collusion between related parties involved in tort actions. See *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006). The law of the state where that relationship is centered should govern the rights of the parties in this case.

At the time of the accident resulting in Corey's injuries, Corey and Taylor were married and living in York, Nebraska. Their common domicile was Nebraska at the time the lawsuit was filed. The trip to Colorado began in Nebraska and was intended to end in Nebraska. The relationship of the parties was centered in Nebraska, and this state has the most significant relationship to the parties. Nebraska's guest statute should apply.

[5] The district court sustained Taylor's motion for summary judgment. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be

drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Papillion Rural Fire Prot. Dist. v. City of Bellevue, ante* p. 214, 739 N.W.2d 162 (2007). The lower court was correct in concluding that Corey's negligence claim against Taylor, his wife, was barred by the guest statute.

## CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., concurring.

I continue to believe that the Nebraska guest statute, Neb. Rev. Stat. § 25-21,237 (Reissue 1995), violates the equal protection clause of the Nebraska Constitution. See *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006) (Gerrard, J., dissenting). But there has not been a constitutional question raised in this case, and I agree with the majority's analysis of the questions presented. On that basis, I concur in the opinion of the court.

MCCORMACK, J., joins in this concurrence.

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SHEILA K. BELLER, APPELLANT, V.
DEBBIE CROW ET AL., APPELLEES.
742 N.W.2d 230

Filed December 7, 2007. No. S-06-872.

1. **Attorneys at Law: Appeal and Error.** In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling.
2. **Attorneys at Law: Witnesses.** When a party seeks to disqualify an opposing attorney by calling that attorney as a witness, the court must strike a balance between the potential for abuse and those instances where the attorney's testimony may be truly necessary to the opposing party's case.
3. **Attorneys at Law: Testimony: Proof.** The party moving to disqualify an opposing attorney bears the burden of establishing that the attorney's testimony will be necessary.
4. **Trial: Attorneys at Law: Witnesses: Judgments.** A court cannot order disqualification simply upon the moving party's representation that the lawyer it seeks to disqualify is a necessary witness; the key is the evidence showing that the lawyer is a necessary witness.

5. **Trial: Attorneys at Law: Witnesses: Evidence.** A party seeking to call opposing counsel can prove that counsel is a necessary witness by showing that (1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable elsewhere.
6. **Trial: Attorney and Client: Witnesses.** That one or both parties could reasonably foresee that a lawyer would probably be a witness is relevant when determining whether the lawyer's disqualification would work substantial hardship on the client.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Gary D. McGuane for appellant.

Patrick M. Flood and Emily L. Jung, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellees Mount Michael Benedictine High School and Thomas Ridder.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Plaintiff Sheila K. Beller appealed the district court's disqualification of her counsel, Gary D. McGuane. Upon a motion filed by two of the defendants, the court disqualified McGuane because he had firsthand knowledge about the facts and issues of the lawsuit, making his testimony at trial "essentially inevitable."

The main issue is whether the district court correctly disqualified McGuane, because of his personal relationship with Beller and his firsthand knowledge of the relevant issues. Specifically, we must determine whether McGuane is likely to be a necessary witness at trial to justify his disqualification under Neb. Ct. R. of Prof. Cond. 3.7 (rev. 2005). Because McGuane is likely to be a necessary witness from his active participation in the events leading to the filing of Beller's complaint, we affirm.

## BACKGROUND

Beller sued Debbie Crow, Alan Crow, Mount Michael Benedictine High School, Thomas Ridder, Cindi Backes, Steve Backes, and Theresa Gregg. Beller's complaint consisted of three counts: defamation, intentional infliction of emotional distress, and alienation of affection. Beller's complaint includes

allegations that the defendants falsely and maliciously stated that she was an abusive mother, that she neglected her minor children, and that she was mentally unfit to care for her minor children. She also claims that the defendants conspired to destroy her relationship with her children and to remove them from her custody, intentionally inflicting emotional distress on her. Beller alleges that the defendants induced one of her sons to run away from home, threatened to have her arrested, and sought to prevent her from speaking to her children. The court dismissed Beller's claims for alienation of affection, and those claims are not part of this appeal.

Beller's counsel, McGuane, is an Illinois attorney who was granted leave to appear pro hac vice. Three months after Beller filed her complaint, Mount Michael Benedictine High School and Thomas Ridder (collectively Mount Michael) moved to disqualify McGuane. In its motion, Mount Michael argued that McGuane "will likely be a necessary fact witness pursuant to Nebraska Rules of Professional Conduct Rule 3.7." Mount Michael asserted that McGuane was "privy to interactions [Beller] had with many of the co-Defendants" and that "McGuane is believed to possess factual information pertaining to [Beller's] alleged emotional distress and alleged damage to reputation." The court deferred the motion and granted Mount Michael leave to submit McGuane's deposition.

At his deposition, McGuane testified that he had been representing Beller for about 2½ years. He met Beller in an Internet "chat room," where she first asked him a question about her desire to go to college and maybe law school. He began giving her legal advice when she asked about divorces and annulments in the Catholic church. Although the record is not entirely clear, it appears McGuane and Beller developed a friendship and ultimately a close personal relationship. Attached to the deposition transcript is an exhibit that includes a Christmas card with affectionate comments that McGuane sent Beller in 2003.

Mount Michael asked McGuane whether he had witnessed any of the defamation or intentional infliction of emotional distress claims. In response, McGuane stated he witnessed an argument in February 2005 between Beller and defendant Gregg at Beller's home when Gregg tried to stop Beller from leaving

Omaha with her sons, who were present. McGuane explained that he "observed [Gregg] causing [Beller] emotional distress" and that the event "brought [Beller] almost to hysteria."

McGuane also described his involvement in the incident with Gregg. When Gregg refused to leave upon Beller's request, McGuane told Gregg to leave. When Gregg refused to move from behind Beller's car, McGuane let Beller take his car so she could leave the scene. When Gregg tried to follow Beller down the street, McGuane stood behind Gregg's car to prevent her from leaving the driveway.

McGuane also testified that he was present in April 2005 when defendant Ridder, Mount Michael Benedictine High School's principal, refused Beller permission to see her son at the high school. McGuane had accompanied Beller to the school so she could see her son. McGuane initially stayed in the car while Beller went into the building. At some point, he called the police to help Beller in gaining custody of her son, and he entered the school once the police arrived. McGuane agreed that the event with Ridder was relevant to Beller's intentional infliction of emotional distress and defamation claims.

McGuane was also present for several telephone calls between Beller and defendant Debbie Crow, but he was only able to hear Beller's end of the conversations. When asked whether these conversations formed any basis of Beller's complaint, McGuane stated that he assumed the telephone calls contributed to Beller's stress.

McGuane also acknowledged that he had a chance to observe Beller's emotional state before January 2005. He believes she has suffered emotional distress since then. He has seen her upset and depressed. According to McGuane, her sons and "everyone else near her" have observed Beller experience emotional distress. When asked whether he had caused Beller any emotional distress, McGuane responded, "I believe I have made it easier for her, actually."

After reviewing the deposition transcript, the court entered an order disqualifying McGuane as "mandated under Rule 3.7 of the Nebraska Rules of Professional Conduct." The court noted that Beller had no intent to call McGuane as a fact witness at trial. But the court also explained that "the Defendants

indicated that McGuane's knowledge of the events at issue in this case make his testimony at trial essentially inevitable, if only for credibility purposes." The court further provided that "[e]ven if . . . McGuane were not to testify at trial, it would not be feasible for the trier of fact to separate out his participation in the trial as an advocate, as opposed to a fact witness giving evidence in the course of his representation." Beller appealed McGuane's disqualification.

## ASSIGNMENTS OF ERROR

Beller assigns, restated, that the court erred in disqualifying McGuane because (1) Mount Michael failed to offer evidence sufficient to establish that McGuane would be a necessary witness at trial and (2) the disqualification would work a substantial hardship on her.

## STANDARD OF REVIEW

[1] In an appeal from an order disqualifying counsel, we review the trial court's factual findings for clear error and ultimately make our disqualification decision independent of the trial court's ruling.[1]

## ANALYSIS

In 2005, the Nebraska Rules of Professional Conduct replaced the Nebraska Code of Professional Responsibility. The Code of Professional Responsibility remains effective for conduct occurring before September 1, 2005. Here, the relevant conduct—McGuane's testifying at trial—did not occur before September 1, 2005, and, therefore, the Rules of Professional Conduct apply.

Rule 3.7 provides in relevant part:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

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[1] *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000).

Although we have applied a predecessor to rule 3.7 under the Code of Professional Responsibility,[2] this is our first case addressing rule 3.7.

The official comments to rule 3.7 describe the policies underlying the witness-advocate rule. Comment 1 explains that "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." Comment 2 provides in part:

> The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[2] Additional considerations are involved when a party seeks to call an opposing attorney and thereby disqualify that attorney. There are times when a court must disqualify counsel because an adverse party intends to call counsel as a necessary witness. But we recognize that a party may move to disqualify opposing counsel for mere tactical or strategic reasons.[3] Clearly, such practice would conflict with the opposing litigant's right to counsel of its choice.[4] Therefore, the court must strike a balance "between the potential for abuse and those instances where the attorney's testimony may be truly necessary to the opposing party's case."[5]

### McGuane Is "Likely to Be a Necessary Witness"

The general rule in rule 3.7 states that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a

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[2] See, *Mutual Group U.S. v. Higgins, supra* note 1; *State ex rel. Line v. Rouse*, 241 Neb. 784, 491 N.W.2d 320 (1992).

[3] See, *Security General Life Ins. v. Superior Court*, 149 Ariz. 332, 718 P.2d 985 (1986); *Smithson v. U.S. Fidelity & Guar. Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991).

[4] See *Security General Life Ins. v. Superior Court, supra* note 3.

[5] See *Smithson v. U.S. Fidelity & Guar. Co., supra* note 3, 186 W. Va. at 201, 411 S.E.2d at 856.

necessary witness . . . ." Beller contends that the court erred in disqualifying McGuane because Mount Michael failed to establish that McGuane would be a necessary witness.

[3,4] Mount Michael, as the party moving to disqualify opposing counsel, bears the burden of establishing that McGuane's testimony will be necessary.[6] A court cannot order disqualification simply upon the moving party's representation that the lawyer it seeks to disqualify is a necessary witness; the key is the evidence showing that the lawyer is a necessary witness.[7]

[5] A party seeking to call opposing counsel can prove that counsel is a necessary witness by showing that (1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable elsewhere.[8] Here, Mount Michael has met both prongs.

First, McGuane's proposed testimony is material and relevant to the issues being litigated. At issue are the defendants' alleged tortious acts and Beller's resulting emotional distress. Mount Michael has shown that not only was McGuane present for events that help form the basis of Beller's complaint, but he also had the opportunity to observe how the defendants' alleged actions affected Beller's emotional state. McGuane's testimony would be material and relevant for determining the claims alleged in Beller's complaint. Therefore, Mount Michael has met the first prong.

Next, Mount Michael cannot obtain McGuane's proposed testimony elsewhere. McGuane witnessed relevant interactions between Beller and the defendants. He also observed Beller's emotional state during relevant periods. We recognize that he was not the only witness to these events: Beller's sons observed the altercation with Gregg; police officers were present at the school during Beller's disagreement with Ridder; and, according to McGuane, Beller's sons and "everyone else near her" has witnessed her emotional distress. Nevertheless, we determine

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[6] See, *McKenzie v. City of Omaha*, 12 Neb. App. 109, 668 N.W.2d 264 (2003); *Eisenstadt v. Eisenstadt*, 282 A.D.2d 570, 723 N.Y.S.2d 395 (2001).

[7] See *McKenzie v. City of Omaha, supra* note 6.

[8] See *Security General Life Ins. v. Superior Court, supra* note 3.

that these other witnesses are unable to provide the same evidence McGuane could provide.

Significant to our decision is McGuane's active participation in relevant altercations between the parties. During the argument between Beller and Gregg, McGuane asked Gregg to leave and later blocked Gregg's car so she could not leave the driveway to follow Beller. When Ridder refused Beller permission to see her son, McGuane involved himself by calling the police. These incidents are relevant to the claims in Beller's complaint. Because of McGuane's active participation and his apparent close personal relationship with Beller, McGuane had a unique perspective of the operational facts. Other witnesses cannot duplicate this perspective. Therefore, Mount Michael has met the second prong.

Because Mount Michael has met both prongs of the above test, it has proved that McGuane is likely to be a necessary witness. Thus, the general rule in rule 3.7 provides that he should not act as Beller's advocate at trial.

### McGuane's Disqualification Will Not Work Substantial Hardship on Beller

Having decided that the general rule in rule 3.7 applies, we must consider whether any of the three exceptions to the general rule preclude McGuane's disqualification. The first two exceptions do not apply. The first exception applies when "the testimony relates to an uncontested issue," and the second exception applies when "the testimony relates to the nature and value of legal services rendered in the case."[9] McGuane's testimony would relate to the defendants' actions and their effect on Beller's emotional state—two contested issues unrelated to the nature and value of McGuane's legal services. Thus, we need only consider the third exception, which applies when "disqualification of the lawyer would work substantial hardship on the client."[10]

Beller contends that the third exception applies because McGuane's disqualification would work a substantial hardship

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[9] Rule 3.7(a)(1) and (2).

[10] Rule 3.7(a)(3).

on her. Beller argues that McGuane's knowledge of the case is extensive. She asserts that the "sheer number of defendants, the long standing series of conduct, [and] the various legal proceedings that have been involved as a result, would all have to be learned by a new attorney."[11] She also states that although she has local counsel, that counsel has only participated to the extent necessary for McGuane—her "primary counsel"—to appear pro hac vice.[12]

Comment 4 to rule 3.7 recognizes that even when there is a risk of prejudice to the opposing party, "due regard must be given to the effect of disqualification on the lawyer's client." We determine that the effects on Beller are not significant enough to constitute "substantial hardship." Therefore, we agree with Mount Michael's contention that McGuane's disqualification would not work a substantial hardship on Beller.

[6] As noted in comment 4 to rule 3.7, "that one or both parties could reasonably foresee that the lawyer would probably be a witness" is relevant to whether the client will suffer substantial hardship. Beller knew before filing her complaint that McGuane had been personally involved in matters relevant to her case. Therefore, she should have reasonably foreseen that McGuane would probably be a witness at trial.

Also relevant is that Beller has alternative counsel. Beller argues that a new attorney would have to learn the facts surrounding the case. We note, however, that Beller has had local counsel since she filed her complaint. Local counsel appeared for Beller at the hearings on Mount Michael's motion to disqualify. He also appeared for her at McGuane's deposition. Because of his involvement to this point, he should be familiar with this case's background.

We note that other factors may be relevant when determining whether a disqualification will work a substantial hardship on the lawyer's client. Here, however, we determine that these two factors—the foreseeability of McGuane's being a witness and the presence of alternative counsel—establish that McGuane's disqualification would not work a substantial hardship on Beller.

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[11] Brief for appellant at 9.

[12] *Id.* at 10.

We conclude that the third exception in rule 3.7 does not apply under the facts of this case.

## CONCLUSION

We conclude that the district court did not err in disqualifying McGuane. Because of his unique perspective on the operational facts, McGuane is likely to be a necessary witness at trial. None of the exceptions in rule 3.7 operate to prevent his disqualification. We affirm the court's disqualification of McGuane under rule 3.7.

AFFIRMED.

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BELLE TERRACE, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, APPELLANT.

742 N.W.2d 237

Filed December 7, 2007. No. S-06-876.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Administrative Law.** In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
3. **Administrative Law: Appeal and Error.** Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.
4. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, John L. Jelkin, and, on brief, Douglas D. Dexter for appellant.

Elise Meerkatz and Abbie J. Widger, of Johnson, Flodman, Guenzel & Widger, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

## NATURE OF CASE

This appeal arises out of a dispute between Belle Terrace and the Department of Health and Human Services Finance and Support (Department) as to what expenses should be considered by the Department in setting the Medicaid reimbursement rate for Belle Terrace. At issue is the cost basis of buildings purchased in 2000.

In June 2003, Belle Terrace submitted a cost report to the Department, claiming the cost basis for its buildings should be the cost of the buildings when they were purchased in 2000. The Department adjusted Belle Terrace's cost basis and requested that Belle Terrace report the 1972 cost of the buildings, which the Department would use to calculate the basis for depreciation. Belle Terrace appealed the audit adjustments to the director of the Department, and the director approved the adjustments. Belle Terrace appealed to the district court, arguing the audit adjustments were in error. The district court reversed the order of the director, and the Department appeals.

## SCOPE OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007); *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006); *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006); *Mortgage Elec. Reg.*

*Sys. v. Nebraska Dept. of Banking*, 270 Neb. 529, 704 N.W.2d 784 (2005).

## FACTS

Belle Holdings, Inc., doing business as Belle Terrace, is a skilled nursing facility located in Tecumseh, Nebraska. It was constructed in 1972 by the Lynn-Shuey-Schutz Joint Venture, which consisted of Gene Lynn, Keith Shuey, and John and Virginia Schutz. The Lynn-Shuey-Schutz Joint Venture owned the buildings and the real estate. Later, Lynn acquired the Schutzes' interest, giving Lynn a two-thirds interest and Shuey a one-third interest in the Lynn-Shuey Joint Venture.

Belle Holdings, which consisted of David Fleisner, Robert Shambora, and Sharon Colling, subsequently purchased the business operations and the lease of the land and buildings from an entity that had operated the nursing facility and had leased the land and buildings from the Lynn-Shuey Joint Venture.

In 2000, Belle Investments, L.L.C., which was owned by Fleisner, Shambora, Colling, and Shuey, purchased the land and buildings from the Lynn-Shuey Joint Venture. The total purchase price was $1,375,406.50. Belle Investments paid Lynn $916,937.67 and Shuey $458,468.83.

On May 1, 2002, Belle Holdings purchased the land and buildings from Belle Investments and, therefore, owned all the assets of the nursing facility. This was the first time in the nursing facility's history that the entity operating the facility and being reimbursed by Medicare and Medicaid also owned the land and buildings.

On its June 30, 2003, cost report, Belle Terrace listed the land and buildings on its depreciation schedule and included the interest payments and other costs associated with the Housing and Urban Development loan it used to purchase the nursing facility. Belle Terrace reported an adjusted land cost of $36,400 and an adjusted nursing home cost of $950,422. The Department disallowed the depreciation figures and asked Belle Terrace to provide information relating to the original cost of the buildings. When Belle Terrace failed to provide the requested information, the Department disallowed all depreciation expenses in Belle Terrace's cost report. It also disallowed the expense for

interest on the loan for the purchase of the land and buildings, the mortgage insurance protection required by the loan, and the amortization bond expense. The Department found that these were not allowable reimbursement costs based on the adjustment to the depreciation expense.

Belle Terrace appealed the adjustments, and a hearing was held in front of the director of the Department. The director found that the action of the Department in making audit adjustments to Belle Terrace's June 30, 2003, cost report was proper. It therefore affirmed the audit adjustments.

Pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Cum. Supp. 2004), Belle Terrace appealed to the district court for Lancaster County. The issues presented to the district court were (1) whether the director erred in affirming the audit adjustments that disallowed Belle Terrace's expenses and (2) whether the director erred in applying the "related party rule" in order to disallow depreciation and interest expenses. The related party rule protects the Department from paying artificially inflated costs that may be generated from less than arm's-length bargaining when a facility is purchased from an organization related to the purchaser by common ownership or control.

The district court determined that the director erred in affirming the adjustments to Belle Terrace's expenses and erred in applying the related party rule in order to disallow the expenses used to calculate Belle Terrace's Medicaid reimbursement rate. It ordered the matter remanded to the Department with directions to allow these expenses as submitted by Belle Terrace on its June 30, 2003, cost report and to recalculate the nursing facility's Medicaid reimbursement rate accordingly. The Department appeals from the district court's order.

## ASSIGNMENTS OF ERROR

The Department assigns, restated and consolidated, that the district court erred in finding that its audit adjustments were in error.

## ANALYSIS

The central issue in this case is the meaning of the term "in existence" as it was used in 471 Neb. Admin. Code, ch. 12,

§ 011.06H (1992). The resolution of this issue will determine whether the 1972 cost or the 2000 cost of Belle Terrace's buildings should be used as the cost basis to determine depreciation and, in turn, other expenses.

The Department calculated Medicaid reimbursement payment rates for nursing facilities based on required annual cost reports submitted by the facilities and audited by the Department. See 471 Neb. Admin. Code, ch. 12, § 011.08B (2002). The Medicaid reimbursement rates were based on each facility's allowable costs incurred and documented in the cost report. See 471 Neb. Admin. Code, ch. 12, § 011.08D (2002). The Department then determined the facility-specific prospective per diem rate subject to certain limitation provisions.

At all times relevant to this case, § 011.06H provided that the fixed cost basis for facilities purchased as an ongoing operation was the lesser of the following:

> 1. The acquisition cost of the asset to the new owner;
>
> 2. The acquisition cost which is approved by the [Department] Certificate of Need process; or
>
> 3. For facilities purchased as an ongoing operation on or after December 1, 1984, the allowable cost of the asset to the owner of record as of December 1, 1984, or for assets not *in existence* as of December 1, 1984, the first owner of record thereafter.

(Emphasis supplied.) This section of the Nebraska Administrative Code used language similar to a federal Medicare regulation. See Medicare's "Provider Reimbursement Manual," part I, § 104.10(C). The federal Medicare regulations on depreciation define an asset "not in existence" as "any asset that physically existed, but was not owned by a hospital or [skilled nursing facility] participating in the Medicare program as of July 18, 1984." § 104.10(C)(1). The Nebraska Administrative Code did not define the term "in existence" but specifically stated that the Nebraska Administrative Code "replaces Medicare regulations on depreciation in their entirety." 471 Neb. Admin. Code, ch. 12, § 011.09 (2002).

The Department maintains that although the Nebraska Administrative Code employs virtually the same language as the federal Medicare regulation, Nebraska has not adopted the

federal Medicare definition of "in existence." The Department claims that "in existence" has a plain and ordinary meaning—physical existence—and that the term should be afforded such meaning. The Department further claims that the federal Medicare definition of "in existence" found in the depreciation section of the Medicare regulations does not apply because the Nebraska Administrative Code "replaces Medicare regulations on depreciation in their entirety," except for a small exception not applicable hereto. See § 011.09. The Department argues that because the Belle Terrace buildings physically existed on December 1, 1984, "the allowable cost of the asset to the owner of record" as of that date should have been used to calculate depreciation for purposes of Medicaid reimbursement. See § 011.06H.

Belle Terrace relies on the federal Medicare definition in arriving at its depreciation figures. Its position is that although the buildings physically existed, the buildings were not "in existence" for Medicaid purposes until they were owned by a skilled nursing facility participating in the Medicaid program, i.e., when Belle Holdings purchased the property and brought the property and operations under one ownership umbrella. Belle Terrace argues that the federal Medicare definition of "in existence" should be used because (1) the term "in existence" is ambiguous, (2) the term "in existence" has a peculiar and appropriate meaning in the reimbursement industry, and (3) federal authorities have not sanctioned the Department's definition of "in existence" because the Department failed to provide the required notice.

The district court found that the Department's regulations had created an ambiguity between state and federal law. The court stated that Nebraska had adopted into its administrative code language similar to that used in a federal Medicare regulation but that the Department was interpreting the term differently. The court noted that Nebraska had not adopted the federal Medicare definition of "in existence," yet no alternative definition was provided. Thus, according to the court, "Medicaid providers are left to guess whether the term 'in existence' should be afforded the meaning provided by federal regulations or the different definition argued for by the [Department]." The

court further found that the federal Medicare definition of "in existence" was commonly used in the Medicaid industry and that Belle Terrace was reasonable in relying on that definition in preparing its annual cost report. The court stated that if the Department "had intended to use a different meaning, it should have specifically redefined the term in order to avoid confusion." The court concluded that Belle Terrace should be reimbursed for depreciation of its nursing facility based on the historical cost of the building in 2000 when the nursing home was purchased by Belle Investments.

[2-4] In our review of the order of the district court, we are guided by the following principles: It is a rule of statutory interpretation that in the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning. See, *City of Alliance v. Box Butte Cty. Bd. of Equal.*, 265 Neb. 262, 656 N.W.2d 439 (2003); *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002). Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994); *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Sunrise Country Manor*, *supra*; *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994).

After considering these principles, we reach our own conclusion independent of that of the district court. We find that the meaning of the term "in existence" is unambiguous; that the plain, direct, and ordinary meaning of "in existence" is physical existence; that the Department has consistently interpreted "in existence" to mean physical existence; and that the Department's regulations provided the proper notice.

The language of § 011.09 clearly states that the Nebraska Administrative Code replaces the federal Medicare regulations on depreciation except as provided within the code. Thus, the term "in existence" must be given its plain and ordinary meaning, which is clearly physical existence. Giving the term "in

existence" its plain and ordinary meaning, it is apparent that the Belle Terrace facility was constructed in 1972 and, therefore, was "in existence" in 1984.

The federal Medicare regulations relating to depreciation have not been adopted by the State of Nebraska with regard to Medicaid. More importantly, the record from the hearing before the Department establishes that the Department does not use Medicare's definition of the term "in existence." The record indicates that the Department has consistently applied the plain meaning of the term "in existence" in determining depreciation of nursing facilities for purposes of Medicaid reimbursement and that there have been no deviations in the application of this policy in the past. The Department's exclusion of the federal definition of "in existence" along with its consistent application of the plain meaning of "in existence" placed Belle Terrace on notice that "in existence" meant physical existence.

How an agency interprets its own regulations is a clear indication of the meaning of a term that the agency uses in its regulations. The Department's senior auditor testified that the Department has consistently interpreted § 011.06H to require that for facilities physically in existence and purchased as an ongoing operation after December 1, 1984, the cost basis is the allowable cost of the asset to the owner of record as of December 1, 1984. Therefore, because Belle Terrace has been in existence since 1972, the 1972 cost must be used as the basis for depreciation because the buildings physically existed on December 1, 1984.

We therefore conclude that the order of the district court directing that Belle Terrace should receive depreciation reimbursement based on the historical cost of the nursing home at the time of the purchase of Belle Investments in 2000 was in error in that it did not conform to the law and was not supported by competent evidence.

[5] The Department also claims that the district court erred in finding that the Lynn-Shuey Joint Venture and Belle Investments were not related parties. Since we have decided the cause on the issues raised above, we decline to consider this issue. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Papillion Rural*

*Fire Prot. Dist. v. City of Bellevue, ante* p. 214, 739 N.W.2d 162 (2007).

## CONCLUSION

We reverse the judgment of the district court for Lancaster County and remand the cause with directions to reinstate the director's order.

REVERSED AND REMANDED WITH DIRECTIONS.

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# IN RE INTEREST OF LAURANCE S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LAURANCE S., APPELLANT.

# IN RE INTEREST OF MICHAEL S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MICHAEL S., APPELLANT.

742 N.W.2d 484

Filed December 7, 2007. Nos. S-06-1439, S-06-1443.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Statutes: Appeal and Error.** The interpretation of a statute is a question of law for an appellate court.
3. **Minors: Juvenile Courts.** A juvenile proceeding is not a prosecution for a crime but a special proceeding that serves as an ameliorative alternative to a criminal prosecution, and the purpose of Nebraska's statutes relating to youthful offenders is the education, treatment, and rehabilitation of the child.
4. **Juvenile Courts: Restitution.** When a juvenile court enters an order of restitution under Neb. Rev. Stat. § 43-286(1)(a) (Reissue 2004), the court should consider, among other factors, the juvenile's earning ability, employment status, financial resources, and other obligations.
5. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal when those issues are likely to recur during further proceedings.
6. **Juvenile Courts: Restitution: Proof.** A juvenile court may use any rational method of fixing the amount of restitution, so long as the amount is rationally related to the proofs offered at the dispositional hearing, and the amount is consistent with the purposes of education, treatment, rehabilitation, and the juvenile's ability to pay.

Appeals from the County Court for Dodge County: KENNETH VAMPOLA, Judge. Reversed and remanded for further proceedings.

Christina C. Boydston, of Register Law Office, for appellant Laurance S.

Melissa Lang Schutt for appellant Michael S.

Jeri L. Grachek, Deputy Dodge County Attorney, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

## NATURE OF CASE

These delinquency proceedings were brought under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2004 & Cum. Supp. 2006) against appellants Laurance S., case No. S-06-1439, and Michael S., case No. S-06-1443. We consolidate these cases for purposes of opinion and disposition. Juvenile proceedings were instituted in the county court for Dodge County alleging that Laurance and Michael, who are brothers, had committed felony criminal mischief. Based on their pleas of no contest, each appellant was adjudicated under § 43-247(2). Following a dispositional hearing, appellants were placed on indefinite probation with restrictions and ordered to pay restitution. Appellants appeal from that portion of the dispositional order that required each of them to pay $29,059.96. As discussed below, we conclude that an order of restitution under § 43-286(1)(a) should serve the rehabilitative purposes of the Nebraska Juvenile Code, and we further conclude that the juvenile court erred when it failed to consider appellants' financial ability to pay restitution in the amount ordered. We reverse the orders in part and remand the causes for further proceedings consistent with this opinion.

## STATEMENT OF FACTS

There is essentially no dispute with regard to the material facts. On August 18, 2006, appellants broke into Washington

Elementary School in Fremont, Nebraska, where they proceeded to damage five classrooms. Appellants set off fire extinguishers, broke computer monitors, and splattered paint and glue on the walls, ceilings, desks, books, computers, and carpets. Shortly thereafter, appellants came forward to authorities and admitted responsibility for the incident. On August 30, separate juvenile petitions were filed in the county court for Dodge County, alleging that appellants had committed the Class IV felony of criminal mischief in violation of Neb. Rev. Stat. § 28-519 (Cum. Supp. 2006). Appellants each pled no contest to the allegations in the petitions, and as a result, each was adjudicated a child as defined in § 43-247(2) on September 19.

On November 20, 2006, a dispositional and restitution hearing was held in both juvenile proceedings. Restitution is permitted in juvenile cases under § 43-286(1)(a). Relative to the restitution issue, the State called four witnesses, including several individuals from the Fremont Public School District, and offered 28 exhibits into evidence. The evidence showed that the school district had incurred expenses in order to replace or repair property damaged by appellants in the total amount of $29,059.96. On November 30, the court entered dispositional orders under which it placed each appellant on indefinite probation with restrictions and ordered each appellant to pay restitution, presumably to the school district, in the amount of $29,059.96. Appellants appeal.

## ASSIGNMENTS OF ERROR

On appeal, appellants assign several errors contesting only the restitution portion of the dispositional order entered in their respective case. The primary assignment of error, which we restate and summarize, is a claim that the juvenile court erred when it failed to consider appellants' financial resources in ordering restitution. Appellants assert additional assignments of error challenging the method by which the juvenile court determined the amount of restitution that it ordered.

## STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent

of the juvenile court's findings. *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007).

## ANALYSIS

Together, these appeals raise issues as to the propriety of the juvenile court's having ordered appellants to pay restitution in the amount determined by the court and the proper approach juvenile courts should use in setting a restitution amount under § 43-286(1)(a). More specifically, appellants claim that the juvenile court failed to consider their ability to pay the restitution amount established by the court and that the amount determined was not reached in a reasonable manner.

In connection with their primary assignment of error regarding ability to pay, appellants assert that before setting the restitution amount, the juvenile court should have heard and considered evidence concerning appellants' employment history and their ability to work, as well as appellants' financial resources. In support of their arguments, appellants suggest that factors similar to those considered in criminal restitution proceedings should be considered by the court when ordering restitution in juvenile cases.

Appellants refer this court to the criminal restitution statute, Neb. Rev. Stat. § 29-2281 (Reissue 1995), which provides, in pertinent part, as follows:

> To determine the amount of restitution, the court may hold a hearing at the time of sentencing. [In determining the amount of restitution the] court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim. . . . The court may order that restitution be made immediately, in specified installments, or within a specified period of time not to exceed five years after the date of judgment or defendant's final release date from imprisonment, whichever is later.

Although we have previously held that criminal restitution statutes do not control in juvenile proceedings, see *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007), we agree with appellants that the factors listed in § 29-2281 may

serve as useful guidelines in setting restitution amounts in juvenile proceedings.

We begin our analysis by reference to well-established principles involving juvenile proceedings. As we stated in *In re Interest of Brandon M.*, 273 Neb. at 51, 727 N.W.2d at 234:

> We have long recognized that a juvenile court proceeding is not a prosecution for crime, but a special proceeding that serves as an ameliorative alternative to a criminal prosecution. [Citations omitted.] The purpose of our statutes relating to the handling of youthful offenders is the education, treatment, and rehabilitation of the child, rather than retributive punishment. [Citations omitted.] The emphasis on training and rehabilitation, rather than punishment, is underscored by the declaration that juvenile proceedings are civil, rather than criminal, in nature.

See, also, *In re Interest of Brandy M. et al.*, 250 Neb. 510, 524, 550 N.W.2d 17, 26 (1996) (stating that "the foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests"); *In re Interest of A.M.H.*, 233 Neb. 610, 614, 447 N.W.2d 40, 44 (1989) (quoting *In re T. D.*, 81 Ill. App. 3d 369, 401 N.E.2d 275, 36 Ill. Dec. 594 (1980)) (stating that primary purpose of juvenile code "'is remedial and preventive rather than punitive'").

The Nebraska Juvenile Code authorizes a court to order "restitution of any property stolen or damaged" by a juvenile as a term and condition of a dispositional order if it is "in the interest of the juvenile's reformation or rehabilitation." § 43-286(1)(a). See, also, Neb. Rev. Stat. § 43-246 (Reissue 2004) (allowing restorative approach by providing "(4) . . . selected juveniles the opportunity to take direct personal responsibility for their individual actions by reconciling with the victims through juvenile offender and victim mediation and fulfilling the terms of the resulting agreement which may require restitution and community service," consistent with "the responsibility of the juvenile court to act to preserve the public peace and security").

Unlike the provisions in the juvenile codes or rules of other states, § 43-286(1)(a) of the Nebraska Juvenile Code does not prescribe any particular method by which to determine whether restitution is appropriate or the amount of restitution

to be awarded. See, e.g., *In re R.T.*, No. 0408020557, 2005 WL 1420878 at *3 (Del. Fam. Feb. 28, 2005) (unreported decision) (discussing Delaware Family Court Criminal Procedure Rule outlining "guidelines" for awarding restitution); *In re R.V.*, 283 Ga. App. 355, 356, 641 S.E.2d 591, 592 (2007) (stating that Georgia juvenile statute "requires the juvenile court to conduct a hearing and consider multiple factors in determining the amount of restitution"); *In re T.M.R.*, 334 Mont. 64, 144 P.3d 809 (2006) (stating that Montana juvenile statute lists factors for court to consider in determining whether restitution is appropriate).

Because Nebraska's juvenile code does not provide guidelines to courts entering restitution orders, there is a risk that an order could be entered imposing a restitution amount that is unreasonable and inconsistent with the purpose of the juvenile code. Such an order could give rise to frustration that would negate the juvenile code's rehabilitative purpose. "'The result of such [an order] would not be rehabilitation. Rather, it would give the [juvenile] a sense of unfairness, injustice and bitterness towards the system because the chance to reform would not be present.'" *State v. Kristopher G.*, 201 W. Va. 703, 705, 500 S.E.2d 519, 521 (1997) (quoting *State v. M.D.J.*, 169 W. Va. 568, 289 S.E.2d 191 (1982)). Moreover, a restitution order without specific requirements and time commitments as to when restitution must be paid similarly fails to permit the juvenile to feel that he or she is gainfully making amends for past transgressions. See *id.* at 706, 500 S.E.2d at 522 (stating that "[a]ny restitution award should . . . be set in an amount that is within the realistic ability of the children to pay within a reasonable period of time, so that they can complete a probationary period, put . . . events behind them, and move forward").

Finally, a restitution order "imposed . . . in an appropriate manner serves the salutary purpose of making the offender understand that he has harmed not merely society in the abstract but also individual human beings, and that he has a responsibility to" the victim. *In re Brian S.*, 130 Cal. App. 3d 523, 529, 181 Cal. Rptr. 778, 780 (1982). This "salutary purpose" would be directly undermined by the imposition of a restitution order that the juvenile is financially unable to pay.

[2,3] The interpretation of a statute is a question of law for an appellate court, see *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002), and we read § 43-286(1)(a) as being consistent with the overall purposes of the Nebraska Juvenile Code. See *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist., ante* p. 278, 290, 739 N.W.2d 742, 754 (2007) (stating that court's "role, to the extent possible, is to give effect to the statute's entire language"). Section 43-2,128 provides that the Nebraska Juvenile Code should be liberally construed to the end that its purposes may be carried out. Sections 43-246 and 43-246(3) provide that the Nebraska Juvenile Code shall be construed to reduce the possibility of juveniles committing future law violations. We have observed in a delinquency case that a juvenile proceeding is not a prosecution for a crime but a special proceeding that serves as an ameliorative alternative to a criminal prosecution and that the purpose of our statutes relating to youthful offenders is the education, treatment, and rehabilitation of the child. See *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007). We consider § 43-246(1)(a) to be consistent with these purposes of the juvenile code, and we believe it would be prudent that juvenile courts consider factors similar to those utilized in the criminal restitution statute when entering restitution orders during the dispositional phase of a delinquency proceeding.

[4] Referring to the criminal restitution statute merely for guidance, we determine that when a juvenile court enters an order of restitution under § 43-286(1)(a), the court should consider, among other factors, the juvenile's earning ability, employment status, financial resources, and other obligations. Compare § 29-2281. In appropriate cases, it would be consistent with these considerations and the purposes of the juvenile code for the court to require that the juvenile obtain and maintain employment in order to satisfy his or her restitution obligations and his or her responsibility to repay the victim. Moreover, the juvenile court should set a timetable for restitution payments and may order that restitution be made immediately, in specified installments, or within a specified period of time.

In the instant cases, the record does not disclose information regarding appellants' ability to pay restitution, other than the fact

that appellants were deemed eligible for appointed counsel. The record does not reflect that the juvenile court considered appellants' ability to pay restitution when it entered its dispositional orders requiring each appellant to pay $29,059.96. The juvenile court erred in entering the restitution portions of its dispositional orders, and we reverse those portions of the juvenile court's dispositional orders relating to restitution entered in these juvenile proceedings and remand the causes for further proceedings consistent with this opinion. The remaining portions of the dispositional orders are not affected by our ruling.

[5] Although we have concluded that the restitution portions of the juvenile court's dispositional orders must be reversed and the causes remanded for further proceedings, we briefly address appellants' assignment of error to the effect that the juvenile court erred when it ordered restitution based upon the replacement cost of the items damaged rather than on fair market value. This issue is likely to recur on remand. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal when those issues are likely to recur during further proceedings. *Papillion Rural Fire Prot. Dist. v. City of Bellevue, ante* p. 214, 739 N.W.2d 162 (2007).

Appellants claim on appeal that the evidence provided by the school district was limited to the replacement value of the property damaged by appellants and that the juvenile court erred in ordering restitution based upon replacement value. We note that there is some dispute among the parties as to whether "replacement value" is an accurate term for certain of the valuations provided by the school district. Given our discussion of this assignment of error on appeal, it is not necessary for us to resolve this dispute.

As noted above, § 43-286(1)(a) authorizes the juvenile court to order a juvenile to pay "restitution of any property stolen or damaged" as a dispositional term. We have previously stated that "restitution encompasses the '[r]eturn or restoration of some specific thing to its rightful owner' or '[c]ompensation for loss.'" *In re Interest of Brandon M.*, 273 Neb. 47, 52, 727 N.W.2d 230, 235 (2007). In *In re Interest of Brandon M.*, the juvenile court stated that the dollar amount of the restitution order was "'plucked . . . out of the air,'" and we reversed the

restitution order because it lacked a basis in the record. 273 Neb. at 49, 727 N.W.2d at 233. We did not determine in *In re Interest of Brandon M.*, however, the valuation approach to be used to determine a juvenile offender's restitution obligation. Instead, we stated that "[a]lthough strict rules of evidence do not apply at dispositional hearings in juvenile cases, see *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003), and § 43-283, the record must nevertheless support the court's action in imposing restitution." *In re Interest of Brandon M.*, 273 Neb. at 52, 727 N.W.2d at 235.

[6] In the instant case, appellants urge us to adopt specific rules regarding a valuation approach for restitution orders in juvenile cases. In this regard, appellants discuss the relative virtue of fair market value as compared to replacement value in restitution orders. The juvenile statutes do not require us to adopt one method, and we decline to do so. Instead, we conclude that juvenile courts should have discretion to set the amount of restitution based on the record presented and the juvenile's ability to pay and that the amount ordered be consistent with the purposes of the Nebraska Juvenile Code. As we stated in *In re Interest of Brandon M.*, the record must support the juvenile court's restitution order. The juvenile courts may use any rational method of fixing the amount of restitution, so long as the amount is rationally related to the proofs offered at the dispositional hearing, and the amount is consistent with the purposes of education, treatment, rehabilitation, and the juvenile's ability to pay. Compare *In re Dina V.*, 151 Cal. App. 4th 486, 59 Cal. Rptr. 3d 862 (2007).

We have considered appellants' remaining arguments made in connection with their assignments of error, and we conclude they are without merit.

## CONCLUSION

We conclude that the restitution orders entered under § 43-286(1)(a) in delinquency proceedings must be supported by the record and that the amount ordered must be consistent with the educational, treatment, and rehabilitative purposes of the Nebraska Juvenile Code and the juvenile's ability to pay. On the record before us, we determine that the juvenile court

erred in these cases when it failed to consider whether appellants had the ability to pay restitution in the amount entered in the dispositional orders. Accordingly, we reverse the portion of each dispositional order that ordered each appellant to pay $29,059.96 and we remand the causes for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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AURORA RAMIREZ MASKA, APPELLANT, V.
JOEL DEAN MASKA, APPELLEE.
742 N.W.2d 492

Filed December 7, 2007. No. S-07-187.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Divorce: Child Custody**. When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
3. **Child Custody.** When both parents are found to be fit, the inquiry for the court is the best interests of the children.
4. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Kay E. Tracy, of Legal Aid of Nebraska, for appellant.

Kent A. Schroeder, of Ross, Schroeder & George, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

## NATURE OF CASE

The Buffalo County District Court entered a decree dissolving the marriage of Joel Dean Maska and Aurora Ramirez

Maska. The court awarded custody of the couple's two minor children to Joel. The order provided that Joel would have custody of the children during the school year and that Aurora would have custody during the summer. The parties were previously involved in a legal separation, and at the time of the separation, their property was divided and their debts were allocated. Neither party appeals the division of property or allocation of debt. Aurora appeals the order involving custody of the minor children.

## SCOPE OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

## FACTS

The parties were married on July 19, 2000, in Bogotá, Colombia, South America. Two children were born of the marriage, the first on February 26, 2001, and the second on June 20, 2002. During the marriage, difficulties arose between the parties and efforts to reconcile their differences were unsuccessful. Because of the parties' prior legal separation, the primary issue presented in this case was the custody and support of the minor children.

During the pendency of the divorce proceedings, a juvenile petition was filed in the Buffalo County Court and allegations were made by both parties concerning physical and emotional abuse of the children. The children were placed in the legal custody of the Department of Health and Human Services (DHHS). On May 25, 2005, the juvenile court found that the children's best interests required that they continue in the legal custody of DHHS. The juvenile court found that Aurora was depressed for a variety of reasons, including separation from members of her family left in Colombia, her inability to fluently speak English, and the fact that she had been raised in a very poor environment in Colombia and was likely to view herself as unable to control her future. She was described by a psychologist as being "volatile."

Joel was described by the juvenile court as being outgoing, confident, and balanced but also suffering from situational depression. At that time, the juvenile court found that neither parent was in a position to provide for the children if placed in their individual custody.

On December 20, 2005, the juvenile court entered an order dismissing the proceedings and terminating DHHS' custody of the children. A DHHS representative testified in the district court that the dismissal was based upon a finding by DHHS that the allegations of abuse were unfounded.

At the time of the divorce proceedings and during the time that the juvenile court had jurisdiction of the children, both parents participated in extensive counseling services and completed parenting classes. The district court found that the children had some adjustment problems but that, generally, the children appeared to be relatively well-adjusted and raised no parenting concerns as to either parent.

At trial, Dr. John Meidlinger, a licensed clinical psychologist, testified and opined as to the best interests of the children concerning the issues of custody and visitation. He had been involved with the family on an evaluation basis since the juvenile court proceedings. Meidlinger conducted a custody evaluation of the parties and testified that neither parent was unfit and that the children were remarkably well adjusted given the volatility of the parental relationship. He stated that both parties had tried to cut the other off from the children and that both had anger and resentment issues concerning the other parent. He testified that the children had important relationships with each other but that the current parenting time schedule was not in the children's best interests because it required movement of the children from one home to another on a frequent basis.

Meidlinger opined that Joel was the warmer and more supportive parent and that Aurora exhibited dependency characteristics tending to represent herself as helpless and in need of various agency and private programs. Meidlinger recommended that primary physical custody of the children be given to Joel during the school year and to Aurora during the summer months. He also stated that the court should retain legal custody of the children for a 1-year period to ensure that the parties

could properly adjust, parent, and discontinue the harmful parental relationship.

The district court found that the parties had had a violent and abusive relationship toward each other for at least 6 years and had exhibited traits of physical violence toward each other. After 18 months of intervention by DHHS, the parties' relationship had improved but not to the point where they could interact civilly or jointly parent the children.

The district court concluded that the custody of the minor children should be placed with Joel, subject to Aurora's parenting time as set forth in the decree. In the decree, the court stated that Joel would be the primary custodial parent during the school year and that Aurora would be the primary custodial parent during the summer months. Specific times and dates were set forth in the decree.

The order provided that each party was entitled to receive educational information concerning the progress the children were making in school and other daycare activities. Both parties were entitled to communicate with the school and other daycare personnel concerning the progress of the children and would be entitled to receive the respective educational programs and agency schedules of the children's events. Both parties were also allowed to receive information from all health care providers concerning the health status of the children, and each parent was allowed to make medical decisions on an emergency basis for the benefit of the children when the children were in his or her physical custody.

Based upon the parenting time schedule set forth in the decree and using the joint custody formula, the district court ordered Joel to pay child support of $78 per month. The children were receiving Social Security benefits of $555 per child per month, and these benefits were appropriately proportioned between the parties to ensure the care and well-being of the children while they were in each parent's physical custody. The court found that Aurora should receive 46 percent and Joel 54 percent of the Social Security benefits being paid for the benefit of the children. Joel was ordered to pay 65 percent of the daycare expenses necessary for employment and the same percentage of any medical expenses not reimbursed by a third party.

## ASSIGNMENTS OF ERROR

Aurora claims the district court erred by failing to make specific findings of parental fitness and best interests of the children; erred by not recognizing the evidence showed that Joel was unable or unwilling to fulfill his primary obligation—to promote and facilitate a relationship between the children and Aurora, the noncustodial parent; and erred by using Aurora's national origin and language as a factor against her when evaluating the best interests of the children.

## ANALYSIS

Aurora claims the district court failed to make specific findings regarding the fitness of the parents and the best interests of the children. We conclude there is no merit to this argument. Although the court did not specifically state what was in the children's best interests with regard to custody, such was implied in its custody order. The court recounted that Meidlinger had given his opinion as to the children's best interests concerning custody and visitation and had recommended that primary physical custody be given to Joel during the school year. Many of the facts the court described went directly to the issue of fitness. Meidlinger testified that neither parent was unfit. By adopting Meidlinger's findings concerning fitness and best interests, the court made its determination that both parties were fit for custody.

[2,3] The next issue was which parent should have physical custody for a majority of the time. When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). When both parents are found to be fit, the inquiry for the court is the best interests of the children. *Id.* In determining a child's best interests under Neb. Rev. Stat. § 42-364 (Cum. Supp. 2006), courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and the parents; the effect on the child as the result of continuing or disrupting an

existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; and many other factors relevant to the general health, welfare, and well-being of the child. See *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004).

[4] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Gress v. Gress, supra.* A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004).

In the case at bar, Aurora argues the evidence showed that Joel was either unfit or did not promote the children's best interests because he was either unable or unwilling to fulfill what she deemed the primary obligation of all custodial parents, that is, to promote and facilitate a relationship with the noncustodial parent. We disagree. The record does not establish that either parent was unfit, although it was clear that the parties had had a "violent and abusive relationship towards each other for at least 6 years."

Aurora has not stated any proposition of law specifically requiring that in order to be granted custody, the custodial parent must promote and facilitate a relationship with the noncustodial parent. She relies on two cases from the Nebraska Court of Appeals: *Smith v. Smith*, 9 Neb. App. 975, 623 N.W.2d 705 (2001), and *Kay v. Ludwig*, 12 Neb. App. 868, 686 N.W.2d 619 (2004). It is true that these cases mention the promotion and facilitation of a relationship with the noncustodial parent, but they do not state that this was a completely determinative factor in the decision of whom to award custody. While the promotion and facilitation of a relationship with the noncustodial parent is a factor that may be considered, it is not the only factor nor is it a completely determinative factor.

In its findings, the district court noted that both parties had tried to cut the other off from the children and that both parties had anger and resentment issues concerning the other parent.

However, the court specifically noted that Meidlinger, the child psychologist who had been involved with the parties during the juvenile court proceedings and during the dissolution, testified that neither parent was unfit. There was no evidence that described Joel as unfit, and there was evidence in the record that Joel was and had been the children's primary caregiver. Joel was described as a warmer and more supportive parent, while Aurora tended to represent herself as helpless. Meidlinger reported that Joel would be the better parent to have primary physical custody during the school year and that Aurora needed to demonstrate the ability to support a relationship between the children and Joel.

There is evidence in the record that supports the district court's determination that Joel is a fit parent and promotes the best interests of the children. We therefore conclude there is no merit to this argument.

Aurora's final argument is that the district court abused its discretion by using her national origin and language as a factor against her when evaluating the best interests of the children. Her argument has no merit. The court's decree does not state that it used Aurora's national origin or language as a factor. Meidlinger recommended to the court that the primary physical custody of the children be given to Joel during the school year and to Aurora during the summer months. That is the recommendation the court adopted, and we find no abuse of discretion in the court's decision.

## CONCLUSION

For the reasons set forth above, we conclude that the district court did not abuse its discretion in the award of custody that was entered. We therefore affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT D. MCCULLOCH, APPELLANT.
742 N.W.2d 727

Filed December 14, 2007. No. S-06-275.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
3. **Trial: Evidence: Appeal and Error.** If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
4. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CARLSON, Judges, on appeal thereto from the District Court for Burt County, DARVID D. QUIST, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Matthew M. Munderloh, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

## NATURE OF CASE

Robert D. McCulloch appealed his conviction for first degree sexual assault to the Nebraska Court of Appeals. The Court of Appeals determined that McCulloch had received ineffective assistance of counsel at trial and reversed his conviction. The Court of Appeals concluded that "all the evidence presented by the State" at trial was insufficient to support a conviction

and remanded the cause to the district court for Burt County with directions to dismiss the charges against McCulloch. *State v. McCulloch*, 15 Neb. App. 616, 623, 733 N.W.2d 586, 592 (2007). We granted the State's petition for further review. We reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with instructions to affirm McCulloch's conviction and sentence.

## STATEMENT OF FACTS

The State charged McCulloch with first degree sexual assault, alleging that he subjected his 13-year-old niece, P.M., to sexual penetration at a time when he was 19 years of age or older. See Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995). McCulloch's age at the time of the alleged crime is an element under § 28-319(1)(c). A jury found McCulloch guilty, and the court sentenced him to 8 to 15 years' imprisonment. No direct appeal was taken. McCulloch filed a postconviction action alleging that counsel was ineffective for failing to take a direct appeal, and the court granted relief in the form of the right to file the present direct appeal.

On appeal to the Court of Appeals, McCulloch asserted, inter alia, that he had received ineffective assistance of counsel because defense counsel elicited the only evidence at trial that proved that he was 19 years of age or older at the time of the incident. The Court of Appeals initially rejected this assignment of error. *State v. McCulloch*, 15 Neb. App. 381, 727 N.W.2d 717 (2007) (*McCulloch I*). In *McCulloch I*, the Court of Appeals concluded that regardless of whether counsel's performance was deficient, McCulloch was not prejudiced by such performance because the State had adduced sufficient circumstantial evidence to allow the trier of fact to infer that McCulloch was at least 19 at the time of the crime. The Court of Appeals noted that McCulloch was present in court, was identified by witnesses, and testified in his own behalf and that therefore, his physical appearance was open to view by the jury. The Court of Appeals stated that a defendant's physical appearance may be considered by the jury in determining his or her age. The Court of Appeals noted that there was other circumstantial evidence of McCulloch's age, which in itself was insufficient to

prove his age but which combined with the observation of his physical appearance allowed the jury to reasonably infer that he was at least 19. Such circumstantial evidence noted by the Court of Appeals in *McCulloch I* consisted of P.M.'s references to McCulloch as her father's brother or her uncle and evidence that McCulloch had a sexual relationship with P.M.'s mother 3 years prior to the incident with P.M.

After *McCulloch I* was released, McCulloch moved the Court of Appeals for rehearing. He argued, inter alia, that testimony regarding his sexual relationship with P.M.'s mother was elicited by his own counsel rather than by the State and that therefore, to the extent such evidence supported a finding that he was 19 or older, such fact did not support a finding of no prejudice but instead supported his claim that counsel was ineffective for putting on such evidence. The Court of Appeals granted a rehearing. On rehearing, the Court of Appeals withdrew its opinion in *McCulloch I* and concluded that trial counsel performed in a deficient manner by eliciting the only evidence of McCulloch's age. *State v. McCulloch*, 15 Neb. App. 616, 733 N.W.2d 586 (2007) (hereinafter *McCulloch II*).

In *McCulloch II*, the Court of Appeals referred to *State v. Lauritsen*, 199 Neb. 816, 261 N.W.2d 755 (1978), in which this court held that a jury may consider the defendant's physical appearance to determine his or her age if there is other circumstantial evidence to support an inference that the defendant is of sufficient age. The Court of Appeals again determined that McCulloch's physical appearance was open to view by the jury, because he was present in court and P.M. pointed him out during her testimony. However, the Court of Appeals concluded that the State had not adduced sufficient evidence in addition to physical appearance from which the jury could infer that McCulloch was at least 19 years old. The Court of Appeals noted that the only evidence adduced by the State arguably relevant to McCulloch's age was P.M.'s testimony that McCulloch was her uncle. The Court of Appeals contrasted this evidence to evidence in *Lauritsen* where the defendant had bought alcohol. The Court of Appeals noted that in *Lauritsen,* based on evidence that the defendant bought alcohol, a jury

could reasonably have inferred that the defendant was of legal age to buy alcohol and therefore was of sufficient age under the statute then at issue, Neb. Rev. Stat. § 28-408.03(1)(c) (Reissue 1975). In contrast, in the present case, the Court of Appeals determined that evidence that McCulloch was the 13-year-old victim's uncle did not give rise to a logical inference that he was necessarily at least 19 years old.

The Court of Appeals stated in *McCulloch II* that the State adduced no further circumstantial or other evidence of McCulloch's age and that the only other evidence from which the jury could have inferred that he was at least 19 was adduced by defense counsel. The Court of Appeals noted that during cross-examination of a witness in the State's case in chief, defense counsel elicited testimony that McCulloch had had a sexual relationship with P.M.'s mother 3 years prior to the incident with P.M. and that P.M.'s mother was older than 19 at the time of that relationship. Later in the trial during the case presented by McCulloch, defense counsel elicited testimony during the direct examination of McCulloch's sister that McCulloch was 6 years older than the witness and that the witness had children who were 12 and 13 years old at the time of trial. Because such evidence elicited by defense counsel was the only circumstantial evidence which, when combined with an observation of McCulloch's physical appearance, could have allowed the jury to determine that McCulloch was at least 19 years old, the Court of Appeals determined that defense counsel performed in a deficient manner. The Court of Appeals concluded that because such deficient performance prejudiced McCulloch, he had received ineffective assistance of counsel.

The Court of Appeals further concluded that "all the evidence presented by the State" was insufficient to support a conviction and that therefore, under *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), the Double Jeopardy Clause forbade retrial. *McCulloch II*, 15 Neb. App. at 623, 733 N.W.2d at 592. The Court of Appeals reversed McCulloch's conviction and remanded the cause with directions to dismiss.

We granted the State's petition for further review of *McCulloch II*.

## ASSIGNMENT OF ERROR

On further review, the State asserts that the Court of Appeals erred in concluding that McCulloch received ineffective assistance of counsel.

## STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006).

## ANALYSIS

### *The Record Is Not Sufficient for the Court of Appeals to Determine That McCulloch Received Ineffective Assistance of Counsel.*

The State asserts on further review that the Court of Appeals erred in concluding that McCulloch received ineffective assistance of counsel. The State argues that the Court of Appeals' reasoning was based on a hindsight review of the trial and that the Court of Appeals' analysis presumes that in formulating trial strategy, defense counsel should have been required to assume that the State would fail to prove the age element of the crime. We conclude that the record on direct appeal was not sufficient to determine whether McCulloch received ineffective assistance of counsel and that therefore, the Court of Appeals erred in concluding that he did.

The Court of Appeals determined that McCulloch received ineffective assistance of counsel because defense counsel elicited the only evidence which, when combined with observation of his physical appearance, would have allowed the jury to determine that he was over 19 years old at the time of the incident with P.M. The Court of Appeals cited *State v. Lauritsen*, 199 Neb. 816, 261 N.W.2d 755 (1978). Under *Lauritsen*, the defendant's physical appearance alone is not sufficient to prove the defendant is of a certain age, but it may be considered as evidence of age when combined with other circumstantial evidence to support an inference that the defendant is of a sufficient age. The Court of Appeals noted that the circumstantial evidence in the present case included: (1) testimony presented

by the State that McCulloch was the 13-year-old victim's uncle; (2) testimony adduced by defense counsel on cross-examination during the State's case in chief that McCulloch had a sexual relationship with the victim's mother 3 years prior to the incident with the victim; and (3) testimony adduced by defense counsel during presentation of the defense's case that McCulloch was 6 years older than his sister and that the sister had children who were 12 and 13 years old at the time of trial. The Court of Appeals determined that the evidence presented by the State was not sufficient to support an inference that McCulloch was over 19 and that only the circumstantial evidence adduced by defense counsel was sufficient to support such an inference. The Court of Appeals therefore concluded, based on the record on direct appeal, that defense counsel's performance was deficient.

The Court of Appeals was correct to note that under *Lauritsen*, McCulloch's physical appearance alone was not sufficient to prove his age. We note that the evidence of age required under *Lauritsen* in addition to physical appearance need not be conclusive direct evidence of age, but, rather, may be circumstantial evidence from which a jury might reasonably infer that the defendant is of a sufficient age.

It is not necessary to our resolution of this case to decide whether the Court of Appeals was correct in its determinations that the State's evidence was not sufficient circumstantial evidence to support an inference of McCulloch's age and that the only sufficient circumstantial evidence to support an inference that McCulloch was over 19 was the testimony elicited by defense counsel. For purposes of analysis, we assume that the Court of Appeals was correct in its determination that the State's evidence was not sufficient to prove McCulloch's age and that such element was proved with the addition of circumstantial evidence adduced by defense counsel.

[2,3] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006). If a matter has not been raised or ruled on

at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

The alleged ineffectiveness of counsel in this case was not raised or ruled on at the trial level. We determine that in this case, an evaluation of defense counsel's actions would require an evaluation of trial strategy and of matters not contained in the record. Although the record on appeal shows that defense counsel elicited the arguably strongest circumstantial evidence regarding McCulloch's age during the defense's case, it does not indicate the reason defense counsel elicited such evidence and it does not appear that counsel presented such evidence in a deliberate attempt to establish McCulloch's age. Defense counsel may have had other, reasonable strategic reasons for presenting such evidence.

In this regard, the State argues that defense counsel had a reasonable strategy which included presenting evidence regarding McCulloch's sexual relationship with P.M.'s mother, which relationship might have given P.M. a motive to lie about the sexual assault. The State also notes that McCulloch moved for a directed verdict at the close of the State's case. The State argues that after the motion for directed verdict was denied, defense counsel had the option to decline to present a defense and rely on the State's purported failure to prove McCulloch's age. Instead, defense counsel made a reasonable strategic choice to present a full defense which included the testimony of McCulloch's sister. McCulloch argues in response that the State mischaracterizes trial counsel's defense strategy and that even if counsel had a reasonable defense strategy, as the State claimed, there was no reason for counsel to elicit evidence regarding the relative ages of McCulloch and his sister.

We do not, and cannot, determine on direct appeal whether defense counsel elicited the evidence at issue pursuant to a reasonable defense strategy because there has been no evidentiary hearing to present evidence regarding defense counsel's strategy or lack thereof. While in hindsight it appears that defense counsel may have helped the State prove an element that the State may have failed to adequately prove, without an evidentiary hearing to explore defense counsel's strategy, we cannot determine based solely on the record on direct appeal

that defense counsel's performance was deficient. Such a determination would require consideration of whether defense counsel's actions were reasonable in the context of the trial.

We conclude that the record on appeal is not sufficient to review McCulloch's claim of ineffective assistance of counsel and that therefore, the Court of Appeals erred in concluding in this direct appeal that McCulloch received ineffective assistance of counsel. We therefore reverse the decision of the Court of Appeals in *McCulloch II* and remand the cause to the Court of Appeals with directions to affirm McCulloch's conviction.

*The Court of Appeals Misapplied the* Lockhart *Standard.*

Because we conclude that McCulloch's conviction should be affirmed, we need not consider whether a retrial would violate the Double Jeopardy Clause. However, we take this opportunity to comment on the Court of Appeals' resolution of the Double Jeopardy issue.

After the Court of Appeals determined in *McCulloch II* that McCulloch's conviction should be reversed because of ineffective assistance of counsel, the Court of Appeals considered whether the cause should be remanded for a new trial or whether the Double Jeopardy Clause barred retrial. In considering the Double Jeopardy issue, the Court of Appeals cited *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), for the proposition that "the Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered *by the state* and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict." *McCulloch II*, 15 Neb. App. at 622, 733 N.W.2d at 591 (emphasis in original). The Court of Appeals read *Lockhart* to provide that only evidence offered by the State should be considered in determining whether there was sufficient evidence to sustain a guilty verdict. The Court of Appeals determined that although there was sufficient evidence to sustain the conviction in the present case if all the evidence, including evidence presented by the defense, was considered, there was not sufficient evidence if only the evidence presented by the State was considered. Based on its reading of *Lockhart*, the Court of Appeals concluded that the Double Jeopardy Clause prohibited the State

from retrying McCulloch. As discussed below, because a proper *Lockhart* analysis considers all the evidence admitted at trial, not just that offered by the State, the reasoning of the Court of Appeals, although understandable, was flawed.

We acknowledge that in a line of cases beginning with *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), this court has sometimes stated, referring to *Lockhart*, that the Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence offered by the State and admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. We also note that in the introductory paragraph of *Lockhart*, the U.S. Supreme Court stated, "where the evidence offered by the State and admitted by the trial court — whether erroneously or not — would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial." 488 U.S. at 34. However, a reading of the entire *Lockhart* opinion indicates that the Court did not intend to limit Double Jeopardy analysis to a consideration of only the evidence offered by the State. In *Lockhart*, the Court stated that "a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause." 488 U.S. at 41. The Court analogized the Double Jeopardy analysis to consideration of a motion for judgment of acquittal at the close of all the evidence and noted that a "trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence that is considered by the reviewing court." 488 U.S. at 41-42.

Although the specific issue in *Lockhart* was whether erroneously admitted evidence should be considered and not whether evidence presented by the defense should be considered, a correct reading of *Lockhart* indicates that all evidence admitted by the trial court, including evidence offered by the defense, should be considered in determining whether there was sufficient evidence to permit retrial. This reading is consistent with the reading of *Lockhart* this court made in *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999), wherein we stated that in our evaluation of the sufficiency of the evidence, we consider all of

the evidence admitted at the trial to determine whether there was sufficient evidence to sustain the conviction.

[4] We have referred to "evidence offered by the State and admitted by the court" in *Anderson, supra*, and in other cases including *State v. Morrow*, 273 Neb. 592, 731 N.W.2d 558 (2007), *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006), *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *State v. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002), and *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). To the extent such cases may be read as limiting Double Jeopardy consideration to only evidence offered by the State, they are disapproved. Instead, the proper standard is as follows: The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

## CONCLUSION

On further review of *McCulloch II*, we conclude that the record in this direct appeal was not sufficient to determine whether McCulloch received ineffective assistance of counsel and that therefore, the Court of Appeals erred in determining that he had received ineffective assistance of counsel at trial. We reverse the decision of the Court of Appeals in *McCulloch II* and remand the cause to the Court of Appeals with directions to affirm McCulloch's conviction and sentence.

REVERSED AND REMANDED WITH DIRECTIONS.

# S.L., A MINOR, BY HER NEXT FRIEND, GUARDIAN AND MOTHER, SUSAN L., APPELLANT, V. STEVEN L., APPELLEE.

742 N.W.2d 734

Filed December 14, 2007. No. S-06-563.

1. **Judgments: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.
2. **Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2003), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
3. **Jurisdiction: Judgments: Appeal and Error.** An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party.
4. **Pleadings: Affidavits: Appeal and Error.** If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.
5. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
6. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
7. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
8. **Due Process: Jurisdiction: States: Appeal and Error.** In analyzing personal jurisdiction, an appellate court considers the quality and type of the defendant's activities to decide whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.
9. **Due Process: Jurisdiction: States.** Due process for personal jurisdiction over a nonresident defendant requires that a defendant's minimum contacts with the forum state be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.
10. **Jurisdiction: States.** Two types of personal jurisdiction may be exercised depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction. In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts

with the forum state, if the defendant has engaged in "continuous and systematic general business contacts" with the forum state.

11. ____: ____. If the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert "specific jurisdiction" over the defendant, depending on the quality and nature of such contact.
12. **Due Process: Jurisdiction: States.** The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
13. **Jurisdiction: States.** Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state.
14. ____: ____. The purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum state.
15. **Sexual Assault: Intent.** An intent to inflict injury can be inferred as a matter of law in cases of sexual abuse.
16. **Due Process: Jurisdiction: States.** Due process requires that individuals have fair warning that their conduct may subject them to the jurisdiction of a state in which they do not reside. Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities.
17. **Jurisdiction: States.** Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.
18. **Jurisdiction: States: Proof.** When weighing the facts to determine whether the exercise of personal jurisdiction would comport with fair play and substantial justice, a court may consider (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. Such considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.
19. **Jurisdiction: States.** A state generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded for further proceedings.

Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., and Richard Ducote for appellant.

Elise Meerkatz and Christopher A. Furches, of Johnson, Flodman, Guenzel & Widger, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

In *Susan L. v. Steven L.*,[1] we held that pursuant to the Uniform Custody Jurisdiction and Enforcement Act, Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2004), Canadian courts had exclusive continuing jurisdiction over a custody dispute between Steven L., a resident and citizen of Canada, and Susan L., who resides with the parties' minor daughter, S.L., in Nebraska. The same parties are before us in this appeal from the dismissal of an intentional tort action filed in the district court for Lancaster County by Susan, on S.L.'s behalf, against Steven. Susan alleged that on multiple occasions, Steven transported S.L. from Nebraska to Canada for court-ordered visitation, during which visitation he intentionally abused her, and that such abuse resulted in injuries for which S.L. is entitled to recover compensatory damages. The question presented in this appeal is whether the district court erred in dismissing the action on the ground that it lacked personal jurisdiction over Steven.

## BACKGROUND

### PARTIES

S.L. was born in Canada on March 19, 1998, to Susan and Steven, who both resided in Canada at the time. On October 18, 2000, the Supreme Court of British Columbia, Vancouver, Canada, issued an "Interim Order" awarding custody of S.L.

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[1] *Susan L. v. Steven L.*, 273 Neb. 24, 729 N.W.2d 35 (2007).

to Susan and providing parenting time to Steven. The order contemplated that Susan and S.L. would relocate to Nebraska, which they did in October 2000. S.L. has resided in Nebraska since moving here with Susan, except for visits with Steven in Canada for the court-ordered parenting time.

Steven is a permanent resident of British Columbia and has never resided, owned property, or conducted any type of business in Nebraska. Since October 2000, he has traveled to Nebraska 12 to 14 times to pick up S.L. and transport her to British Columbia for court-ordered parenting time. In November 2004, a British Columbia court entered an order preventing Steven from transporting S.L., but the court did not suspend his visitation rights. After that order was entered, Steven's mother traveled to Nebraska to transport S.L. to British Columbia for two visits with Steven. The British Columbia court retains jurisdiction in the ongoing custody and visitation dispute between Susan and Steven.

## District Court Proceedings

Acting as the next friend, guardian, and mother of S.L., Susan commenced this action against Steven in the district court for Lancaster County. In the complaint, Susan alleged that Steven committed repeated acts of battery and sexual abuse against S.L. during five visits in British Columbia from 2003 through 2005. Susan further alleged that in an effort to coerce silence or recantation, Steven withheld food from S.L. for long periods of time and threatened to prevent any future contact with Susan and other family members.

The complaint was served on Steven in British Columbia. In response, he filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2003) on the ground that the Nebraska court lacked jurisdiction over his person. The motion was submitted on the pleadings, as well as affidavits and exhibits submitted by the parties and received by the court. No oral testimony was heard.

The district court determined that it did not have personal jurisdiction over Steven and granted his motion to dismiss. The court noted that Steven's limited contacts with Nebraska for the purposes of transporting S.L. for court-ordered visitation were

insufficient to subject him to the jurisdiction of Nebraska courts. The court also found that Canada, not Nebraska, was the focal point of the harm alleged and that there was no showing Steven foresaw or reasonably should have foreseen that his alleged conduct in Canada would have any effect in Nebraska. Susan moved to alter or amend the order of dismissal, which was denied by the district court. Susan then filed this timely appeal, and we granted her petition to bypass.[2]

## ASSIGNMENTS OF ERROR

Susan assigns that the district court erred (1) in concluding that Nebraska lacked personal jurisdiction over Steven and (2) in failing to give S.L. the benefit of all reasonable inferences deducible from the pleadings and affidavits.

## STANDARD OF REVIEW

[1-4] When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.[3] When reviewing an order dismissing a party from a case for lack of personal jurisdiction under rule 12(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.[4] An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party.[5] If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in

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[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[3] *Erickson v. U-Haul Internat.*, *ante* p. 236, 738 N.W.2d 453 (2007); *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, 269 Neb. 222, 691 N.W.2d 147 (2005).

[4] *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005). See, *Stanton v. St. Jude Medical, Inc.*, 340 F.3d 690 (8th Cir. 2003); *Epps v. Stewart Information Services Corp.*, 327 F.3d 642 (8th Cir. 2003).

[5] *Ameritas Invest. Corp. v. McKinney*, *supra* note 4. See *Stanton v. St. Jude Medical, Inc.*, *supra* note 4.

the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.[6]

## ANALYSIS

[5,6] Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.[7] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.[8]

### Long-Arm Statute

[7] Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.[9] Thus, we need only consider whether a Nebraska court's exercise of jurisdiction over Steven would be consistent with due process.

### Minimum Contacts

[8-11] In analyzing personal jurisdiction, we consider the quality and type of the defendant's activities to decide whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.[10] In this context, due process requires that a defendant's minimum contacts with the forum state be such that "'maintenance of the suit does not offend

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[6] *Ameritas Invest. Corp. v. McKinney, supra* note 4. See *Epps v. Stewart Information Services Corp., supra* note 4.

[7] *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006); *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004).

[8] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3.

[9] *Erickson v. U-Haul Internat., supra* note 3; *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3.

[10] *Erickson v. U-Haul Internat., supra* note 3.

"traditional notions of fair play and substantial justice."'"[11] Two types of personal jurisdiction may be exercised depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction.[12] In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state, if the defendant has engaged in "'"continuous and systematic general business contacts"'" with the forum state.[13] If the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert specific jurisdiction over the defendant, depending on the quality and nature of such contact.[14] In this case, there is no allegation that Steven had substantial, continuous, or systematic contacts with Nebraska. Rather, Susan alleged that Steven came into the state on several occasions for the specific purpose of transporting S.L. to Canada for court-ordered visitation, during which visitation he committed intentional acts of abuse. We must determine whether these specific acts by Steven establish the necessary minimum contacts which would permit a Nebraska court to exercise jurisdiction over his person without violating his right to due process.[15]

[12-14] The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled

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[11] *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 481, 675 N.W.2d 642, 649 (2004), quoting *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

[12] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3.

[13] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3, 269 Neb. at 226, 691 N.W.2d at 152, quoting *Quality Pork Internat. v. Rupari Food Servs., supra* note 11. Accord *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

[14] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3; *Quality Pork Internat. v. Rupari Food Servs., supra* note 11.

[15] See, *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3; *Diversified Telecom Servs. v. Clevinger, supra* note 7.

into court there.[16] Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state.[17] The "'purposeful availment'" requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . or of the 'unilateral activity of another party or a third person.'"[18] "Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State."[19]

Applying the principle that personal jurisdiction cannot be premised on the unilateral activity of another, several courts have held that a noncustodial parent's exercise of visitation rights or other routine communication with children in a state to which the custodial parent has relocated is not a sufficient contact with that state to subject the noncustodial parent to the jurisdiction of its courts. For example, in *Miller v. Kite*,[20] the custodial parent moved to North Carolina after the parties' divorce and commenced an action there to modify a child support award. The noncustodial parent, who was domiciled in California and resided in Japan, had never resided in North Carolina. The North Carolina Supreme Court held that neither the child's presence in that state nor the noncustodial parent's periodic exercise of his visitation rights and mailing of child support payments there provided the constitutionally required minimum contacts to justify in personam jurisdiction over the noncustodial parent. The court noted that the child's presence

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[16] *Ameritas Invest. Corp. v. McKinney, supra* note 4; *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3.

[17] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 3. See *Diversified Telecom Servs. v. Clevinger, supra* note 7.

[18] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citations omitted). See, also, *Quality Pork Internat. v. Rupari Food Servs., supra* note 11.

[19] *Burger King Corp. v. Rudzewicz, supra* note 18, 471 U.S. at 475.

[20] *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985).

in North Carolina was solely the result of the custodial parent's decision to reside there and that the visitations were temporary and unrelated to the action. Similarly, in *In re Marriage of Bushelman v. Bushelman*,[21] the Wisconsin Court of Appeals held that a noncustodial parent's acquiescence in his children's residence in Wisconsin with the custodial parent, and his letters, telephone calls, and visits with the children in that state, did not satisfy the minimum contacts requirement which would permit a Wisconsin court to exercise personal jurisdiction over him in a divorce proceeding.

Both *Miller* and *In re Marriage of Bushelman* rely in part on the reasoning of *Kulko v. California Superior Court*.[22] In that case, the parties resided with their children in New York until they separated. Their separation agreement provided that their children would reside with the father in New York during the school year, but would spend vacation periods with the mother, who moved to California. One of the children later expressed a desire to live with her mother in California, and the father acquiesced. The other child moved to California without the father's prior knowledge or acquiescence, and the mother then commenced a proceeding in California to modify custody and support obligations which had been in effect under the separation agreement. In reversing a decision of the California Supreme Court's affirmance of a lower court's finding that it had personal jurisdiction over the father, the U.S. Supreme Court noted that there was no claim that the father had "visited physical injury on either property or persons within the State of California" and that the single act of the father's acquiescence in the stated preference of one of his children to reside in California with her mother afforded "no basis on which it can be said that [the father] could reasonably have anticipated being 'haled before a [California] court.'"[23]

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[21] *In re Marriage of Bushelman v. Bushelman*, 246 Wis. 2d 317, 629 N.W.2d 795 (Wis. App. 2001).

[22] *Kulko v. California Superior Court*, 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978).

[23] *Id.*, 436 U.S. at 96-98, citing and quoting *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

In this case, however, Steven's contacts with Nebraska are alleged to involve something much different than the lawful exercise of visitation rights. Susan alleges that during five of these visitations, including three when Steven personally transported S.L. between Nebraska and British Columbia and two when he directed his mother to do so, Steven committed repeated intentional acts of abuse while S.L. was with him in Canada. Although Steven states in his affidavit that the allegations of abuse have been fully investigated in Canada, he does not disclose the results of those investigations, nor does he specifically deny the conduct alleged by Susan. Viewing the allegations of the complaint and the factual statements contained in the parties' affidavits in a light most favorable to Susan in her capacity as next friend, guardian, and mother of S.L., as our standard of review requires, the question is whether a nonresident who repeatedly transports a child residing in Nebraska to another jurisdiction where he commits intentional acts of abuse before returning the child to Nebraska could reasonably expect to be required to defend an intentional tort action brought on the child's behalf in a Nebraska court.

In *Calder v. Jones*,[24] the U.S. Supreme Court addressed an analogous issue involving an intentional tort allegedly committed by residents of one state against a resident of another. In that case, two Florida residents participated in the publication of an article about a California resident, who brought a libel action in California. One of the Florida defendants, a reporter, researched the article through telephone conversations with sources in California and made several business trips to that state. The other Florida defendant, who was the president and editor of the publication, had traveled to California on two occasions, both unrelated to the article in question. Both defendants asserted that as Florida residents, they were not subject to the jurisdiction of the California court in which the libel action was filed. Rejecting their contention, the Court noted that the defendants were "not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly

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[24] *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984).

aimed at California."[25] The Court held that the defendants were "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis."[26]

Employing slightly different reasoning, the court in *Hughs on Behalf of Praul v. Cole*[27] held that a Minnesota court could exercise personal jurisdiction over a noncustodial parent residing in Pennsylvania who had allegedly abused the child, a Minnesota resident, during summer visitations in Pennsylvania. The noncustodial parent had never resided in or visited Minnesota. The court reasoned that while his contacts with the state were not numerous, they were significant in that they included a continuing relationship with the child and repeated telephone calls to the home in Minnesota where the child resided with his mother. The court further noted that the noncustodial parent could reasonably foresee that consequences from the abuse could arise in Minnesota, which had a strong interest in enabling the custodial parent's efforts to protect her child from abuse by seeking a protective order against the noncustodial parent.

[15,16] Based upon Susan's allegations and affidavit, which we must accept as true for purposes of the jurisdictional issue before us, we conclude that Steven's contacts with Nebraska are sufficient to subject him to specific personal jurisdiction of a Nebraska court. The record supports an inference that Steven's undisputed travels to Nebraska for the purpose of transporting S.L. to and from British Columbia were an integral part of the intentional abuse alleged by Susan to have occurred there. As such, Steven's presence in Nebraska would not be random, fortuitous, or attenuated, but, rather, would constitute a means to facilitate intentional harm inflicted upon a Nebraska resident after she was physically removed from the state and before she was returned. An intent to inflict injury can be inferred as a matter of law in cases of sexual abuse,[28] and thus, any abuse

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[25] *Id.*, 465 U.S. at 789.

[26] *Id.*, 465 U.S. at 790.

[27] *Hughs on Behalf of Praul v. Cole*, 572 N.W.2d 747 (Minn. App. 1997).

[28] *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990).

inflicted upon S.L. in Canada would have foreseeable consequences on the child when she was returned to Nebraska. There are also allegations that during at least some of the visitations, Steven made threats intended to prevent S.L. from reporting the abuse to Susan and Nebraska authorities. It is not simply Steven's presence in Nebraska to exercise visitation rights with a Nebraska resident, but, rather, the alleged intentional misuse of such rights as a means of inflicting intentional harm upon S.L., as alleged by Susan, which constitutes the "substantial connection" between Steven and Nebraska. Due process requires that individuals have "'fair warning'" that their conduct may subject them to the jurisdiction of a state in which they do not reside.[29]

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum . . . and the litigation results from alleged injuries that "arise out of or relate to" those activities.[30]

We conclude that one who removes a minor child from her Nebraska home under the guise of exercising a visitation right in another jurisdiction, and then intentionally subjects the child to harm before returning her to this state, could reasonably expect to be haled into a Nebraska court to answer for such conduct in a civil action brought on behalf of the child.

### Fair Play and Substantial Justice

[17,18] Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would

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[29] See, *Burger King Corp. v. Rudzewicz, supra* note 18, 471 U.S. at 472. Accord, *Shaffer v. Heitner, supra* note 23 (Stevens, J., concurring in judgment); *Quality Pork Internat. v. Rupari Food Servs., supra* note 11.

[30] *Burger King Corp. v. Rudzewicz, supra* note 18, 471 U.S. at 472 (citations omitted).

comport with fair play and substantial justice.[31] These considerations include (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies.[32] Such considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.[33]

The fact that Steven is a resident of Canada is an important factor to be considered in this analysis. The U.S. Supreme Court has stated that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[34]

However, the record reflects that Steven has previously participated in Nebraska legal proceedings involving S.L. by requesting the district court for Lancaster County to enforce certain orders entered by a Canadian court. Traveling from his home in Canada to Nebraska for court proceedings should be no more burdensome to Steven than the same journey to exercise visitation rights. Although Steven claims that there are witnesses in Canada upon whose testimony he would rely, there is no showing that he could not preserve their testimony for presentation in a Nebraska court. The record reflects that one such witness, Steven's mother, has previously testified

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[31] *Burger King Corp. v. Rudzewicz, supra* note 18; *Internat. Shoe Co. v. Washington, supra* note 11; *Diversified Telecom Servs. v. Clevinger, supra* note 7.

[32] *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987); *Burger King Corp. v. Rudzewicz, supra* note 18; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980); *Diversified Telecom Servs. v. Clevinger, supra* note 7.

[33] See, *Burger King Corp. v. Rudzewicz, supra* note 18; *Diversified Telecom Servs. v. Clevinger, supra* note 7.

[34] *Asahi Metal Industry Co. v. Superior Court, supra* note 32, 480 U.S. at 114.

on his behalf in a Nebraska proceeding involving S.L. Other witnesses, including law enforcement personnel and medical professionals who would testify on behalf of S.L., are located in Nebraska.

[19] Nebraska has a significant interest in adjudicating the dispute, inasmuch as a state "generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."[35] And the interest of the minor child in obtaining convenient and effective relief is better served in Nebraska, where she resides, than in Canada. Although Canada has an interest in a fair and efficient resolution of the controversy, its interest does not outweigh that of Nebraska.

Considering all relevant factors, we conclude that Nebraska's exercise of specific personal jurisdiction over Steven in this action would not offend notions of fair play and substantial justice.

## CONCLUSION

Based upon our independent review of the complaint and affidavits, viewed in a light most favorable to Susan in her representative capacity as the next friend, guardian, and mother of S.L., we conclude that the district court for Lancaster County has specific personal jurisdiction over Steven and that it erred in granting his motion to dismiss. Accordingly, we reverse the order of dismissal and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[35] *Burger King Corp. v. Rudzewicz, supra* note 18, 471 U.S. at 473.

# STATE OF NEBRASKA, APPELLEE, V. ERIC T. MCGHEE, APPELLANT.

742 N.W.2d 497

Filed December 14, 2007. No. S-06-1332.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Verdicts: Insanity: Appeal and Error.** The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.
3. **Homicide: Intent.** The elements of first degree murder are listed in Neb. Rev. Stat. § 28-303 (Cum. Supp. 2006), which states that a person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice.
4. **Intent: Words and Phrases.** Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.
5. ____: ____. The term "premeditated" means to have formed a design to commit an act before it is done.
6. **Homicide: Intent: Words and Phrases.** One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.
7. **Homicide: Intent: Time.** No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.
8. ____: ____: ____. The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
9. **Homicide: Intent: Juries.** A question of premeditation is for the jury to decide.
10. **Criminal Law: Mental Competency.** The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.
11. **Criminal Law: Insanity: Time.** For an insanity defense, the insanity must be in existence at the time of the alleged criminal act.
12. **Insanity: Proof.** A defendant who pleads that he or she is not responsible by reason of insanity has the burden to prove the defense by a preponderance of the evidence.

13. **Trial: Appeal and Error.** An appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy P. Burns for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

## INTRODUCTION

Eric T. McGhee was convicted of first degree murder and use of a weapon to commit a felony. On appeal, McGhee contends there was insufficient evidence to support a conviction for first degree murder and that he was not responsible by reason of insanity.

## FACTS

*Procedural Background.*

On March 11, 2003, McGhee was charged with first degree murder and use of a weapon to commit a felony in the death of Ezra Lowry. That same day, McGhee's counsel filed a motion to determine competency. Following a mental competency evaluation at the Lincoln Regional Center, McGhee was found not competent to stand trial. Periodic reviews were held with regard to McGhee's status, and on February 10, 2006, the court found that McGhee's competency had returned. On May 15, McGhee notified the court that he intended to plead not responsible by reason of insanity.

A jury trial was held from August 14 to 17, 2006. At trial, McGhee did not contest that he shot Lowry; rather, his theory of defense was that his actions did not amount to first degree

murder. Thus, McGhee contended that a conviction for second degree murder would be more appropriate and that in any case, he was not responsible by reason of insanity. The jury rejected these claims and found McGhee guilty of first degree murder and use of a weapon to commit a felony. On October 25, the district court denied McGhee's motion for a new trial and sentenced him to life imprisonment for first degree murder and 5 to 10 years' imprisonment for use of a weapon to commit a felony.

*Events of January 29 and 30, 2003.*

The events surrounding Lowry's death were presented primarily through the testimony of Jermaine Dunn and Nadeena Washington. McGhee, Dunn, Lowry, and Washington were good friends who frequently socialized together. From the testimony presented at trial, all smoked marijuana and drank alcohol. In addition, both Dunn and McGhee had a history of smoking "wet," a marijuana cigarette dipped in formaldehyde that has been cut with a drug known as PCP.

During the daylight hours of January 29, 2003, the four, along with Lowry's uncle and McGhee's cousin, were at McGhee's home in Omaha drinking and smoking marijuana. Washington testified that she and Lowry had been invited over by McGhee and that when they arrived with Dunn and Lowry's uncle, McGhee seemed upset. The party broke up approximately 30 to 45 minutes later.

Later that evening, Lowry and Washington, along with their 4-year-old son, picked up Dunn and returned to McGhee's home. Upon arrival, they observed McGhee involved in a physical altercation with his girlfriend. Though the evidence is not definitive, it appears that Lowry broke up the fight, the girlfriend left, and the others went inside. Washington testified that the girlfriend continued to telephone McGhee at his home throughout the evening.

The party went on for 2 to 3 hours before McGhee and Washington left to purchase alcohol. According to Washington's testimony, in the 15 minutes she and McGhee were out, they had a conversation in which McGhee implied that he was God.

Upon their return, McGhee and Washington resumed a game of dominoes they had been playing, while Dunn and Lowry played pool. All were drinking and smoking marijuana, and at one point, another acquaintance stopped by for a brief visit. Washington and Dunn testified that there had been no arguments or disagreements between McGhee and Lowry that evening, though Dunn indicated that Lowry had initially expressed displeasure that Washington was going with McGhee to purchase alcohol. Both Washington and Dunn also testified that McGhee had been acting strange recently, including during the course of that evening. In particular, Dunn testified that about 5 minutes before Lowry was shot, McGhee had acted "bizarre," pacing around and briefly going outside. Both Dunn and Washington blamed McGhee's general behavior on smoking "wet," although there is no evidence that he was smoking "wet" on this particular evening. In addition, both Dunn and Washington testified that prior to the shooting, neither had seen a gun that evening.

At some point before Lowry was shot, Washington fell asleep on the couch. Lowry ultimately woke her so the couple and their son could leave, but McGhee talked them out of leaving by producing a large bag of marijuana, and Washington went back to sleep. According to Dunn, McGhee tried to get Washington to roll him a "blunt," but she was still sleeping. McGhee refused to let Lowry do it, so Dunn left the room to do it instead.

Dunn testified that he was in the back room when the music suddenly got "concert loud." Dunn then heard a gunshot. Upon returning to the main room, Dunn saw McGhee pointing a gun at him and Lowry lying on the floor.

At about this time, Washington was awakened by her son, who told her that McGhee had hit Lowry with a pool stick and that Lowry was bleeding. McGhee then pointed the gun between Dunn and Washington. While McGhee indicated that he would not shoot them, he nevertheless chased Dunn around the house.

Dunn escaped through the front door, which he and Washington both testified was locked, though it had not been locked earlier in the evening. As he escaped out the front door, Dunn testified he heard another gunshot. Washington testified

that this gunshot was McGhee's shooting Lowry a second time. She also testified that after McGhee shot Lowry the second time, he turned to Washington and said, "I saved you."

Dunn testified that after he left the house, he saw McGhee walk out onto the front porch of the home, but that McGhee did not appear to see Dunn. Dunn then used a nearby pay telephone to call the 911 emergency dispatch service. Dunn waited for police, directing them to McGhee's home upon their arrival.

When McGhee left the house to look for Dunn, Washington locked the front door behind him. Washington testified that she attempted to call 911 using McGhee's telephone, but found that it had been unplugged. Washington then found Lowry's cellular telephone in his pocket and called 911. Meanwhile, McGhee kicked the door in and reentered the house. He took the telephone from Washington, then pointed the gun at Washington and demanded her car keys, which Washington could not find.

McGhee then forced Washington and her son out of the front door of the house and around to the back alley. McGhee then led them on what Washington described as a "zig-zag" path for about a mile. During this time, McGhee stopped to hide when he heard police sirens and kept saying that the victim was "bad" and "not pure" and that he should have killed Dunn as well. Washington also testified that McGhee kept asking her questions about her son, implying that he, McGhee, was the child's father and that he and Washington had been involved in a sexual relationship. Washington testified that this was not true. At one point, McGhee disposed of Dunn's and Lowry's cellular telephones, but soon after retrieved Lowry's telephone. He then used the telephone to call someone to tell him or her that they were coming. Throughout this walk, McGhee had the gun with him and often insisted on carrying Washington's son.

Eventually, the three arrived at McGhee's aunt's home. McGhee again turned the music up, but allowed Washington to use Lowry's cellular telephone to call for a ride. At some point, McGhee's aunt came downstairs. According to Washington, she told the aunt that McGhee had killed Lowry, which McGhee then denied. In contrast, the aunt testified that Washington simply told her that she and her son were waiting for a ride. In any event, the ride arrived and Washington and her son left.

According to Washington, they left the aunt's home sometime between 2 and 3 a.m. on January 30, 2003.

After Washington and her son left, McGhee indicated that he was also leaving. He returned to the aunt's home at about 6 a.m. and went to sleep. Eventually, the police determined his whereabouts, surrounded the home, and took McGhee into custody. The weapon used to kill Lowry was never recovered.

*Testimony With Regard to McGhee's Mental State.*

Dr. Bruce Gutnik testified for McGhee. Gutnik testified that he evaluated McGhee for approximately 1½ hours and diagnosed him with paranoid schizophrenia with a history of alcohol and cannabis abuse and possible dementia. Gutnik testified that in his opinion, McGhee did not know the difference between right and wrong at the time McGhee shot Lowry. Gutnik additionally testified that he thought McGhee probably did understand that by pointing a gun at Lowry's head and pulling the trigger, Lowry would be severely injured and probably killed, but that McGhee believed he was acting in self-defense. Gutnick also testified that McGhee's actions in evading police, disposing of evidence, and denying responsibility were not inconsistent with the conclusion that McGhee did not know right from wrong. Gutnik reasoned that McGhee had been psychotic and that one should not read too much into McGhee's thought process, as it was not likely to be logical or rational.

Gutnik testified about allegations that McGhee might have been malingering, or faking his symptoms, in order to delay or prevent his return to competency and later for purposes of the insanity defense. According to his testimony, Gutnik did not believe that McGhee was malingering. Gutnik also testified that smoking "wet" could cause delusions and hallucinations, but that those effects should wear off within 6 to 8 hours.

Dr. Louis Martin, a psychiatrist with the Lincoln Regional Center, testified for the State. Martin had been McGhee's treating psychiatrist for at least 2 years during the time when McGhee had been committed pending his return to competency. Martin's initial diagnosis of McGhee was that McGhee suffered from schizophrenia with a history of substance abuse.

In contrast to Gutnik, Martin testified that at the time McGhee shot Lowry, McGhee understood both what he was doing and the nature of his act, and that in spite of McGhee's mental illness, Martin felt McGhee had a basic understanding that what he had done was wrong. Martin felt that McGhee's behavior after the commission of the murder was not "indifferent" and suggested that McGhee was aware that his earlier actions were wrong.

In addition, Martin testified that both he and his staff had had concerns about malingering, notably based upon instances where McGhee would appear closed and noncommunicative when dealing with staff, but perfectly communicative when interacting with other patients. Martin acknowledged that it was difficult to determine where malingering ends and mental illness begins.

## ASSIGNMENTS OF ERROR

McGhee assigns that the district court erred in concluding (1) that there was sufficient evidence to support his conviction for first degree murder and (2) that he was sane at the time of the commission of the murder.

## STANDARD OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[1]

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[1] *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006).

[2] The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.[2]

## ANALYSIS

*Sufficiency of Evidence.*

[3] McGhee first argues that the district court erred in concluding there was sufficient evidence to support his conviction for first degree murder. The elements of first degree murder are listed in Neb. Rev. Stat. § 28-303 (Cum. Supp. 2006), which states that a person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice. McGhee argues the evidence does not support a finding that the killing was done with deliberate and premeditated malice.

[4-9] Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.[3] The term "premeditated" means to have formed a design to commit an act before it is done.[4] One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.[5] No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.[6] The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.[7] A question of premeditation is for the jury to decide.[8]

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[2] *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[3] *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

It is apparent that the evidence, viewed in a light most favorable to the State, supports the jury's finding that McGhee had acted "purposely and with deliberate and premeditated malice."[9] There was evidence presented that McGhee had invited Washington and Lowry over to his house earlier in the day and seemed upset that they brought others with them.

McGhee later invited the couple over again and persuaded them to stay when they indicated a desire to go home. McGhee then refused to allow Lowry to roll him a "blunt" and instead had Dunn leave the room to do so. This could have been seen as an attempt to get one witness out of the room, and with Washington asleep, the only remaining witness would have been Washington's and Lowry's 4-year-old son.

After getting Dunn to leave the room, McGhee turned the music "concert loud," perhaps to mask the sound of gunshots. Then, in the aftermath of the shooting, Washington attempted to place a telephone call, yet found the telephone to be unplugged. However, according to Washington, the telephone had been ringing throughout the evening.

In addition, both Dunn and Washington testified that the front door was locked, though it had apparently not been locked earlier in the evening and several persons, including Washington and McGhee, had been outside. In fact, according to Dunn, McGhee had been outside only minutes prior to the shooting. Finally, there was testimony by both Dunn and Washington that neither had seen a gun all evening until McGhee produced one and shot Lowry.

In short, when the record is viewed in the light most favorable to the State, there is sufficient evidence to support the conclusion that McGhee committed the killing with deliberate and premeditated malice. As such, McGhee's conviction for first degree murder is supported by the record and his first assignment of error is without merit.

*Jury Finding Regarding Sanity.*

[10-12] In his second assignment of error, McGhee argues the district court erred in finding that he was sane at the time

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[9] § 28-303.

he killed Lowry. Nebraska follows the *M'Naghten* rule as to the defense of insanity. The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act.[10] For an insanity defense, the insanity must be in existence at the time of the alleged criminal act.[11] A defendant who pleads that he or she is not responsible by reason of insanity has the burden to prove the defense by a preponderance of the evidence.[12] The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.[13]

Gutnik testified that in his opinion, McGhee did not know the difference between right and wrong and thought that in killing Lowry, he had done a "good deed and expected people to pat him on the back and say way to go." Gutnik further testified that while McGhee understood that putting a gun to Lowry's head and pulling the trigger would likely result in injury or death to Lowry, McGhee nevertheless thought he was acting in self-defense. Martin, on the other hand, testified that he believed McGhee knew his actions were wrong and that such was evidenced by the fact that McGhee to some extent attempted to cover up his actions.

[13] An appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.[14] By rejecting McGhee's insanity defense, the jury clearly believed Martin's testimony that McGhee knew that his actions were wrong. This court will not revisit that finding.

The record contains sufficient admissible evidence for the jury to conclude that McGhee was not insane at the time he shot Lowry. As such, McGhee's second assignment of error is without merit.

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[10] *State v. Harms, supra* note 2.

[11] *Id.*

[12] *Id.* See, also, Neb. Rev. Stat. § 29-2203 (Reissue 1995).

[13] *State v. Harms, supra* note 2.

[14] See *id.*

## CONCLUSION

There was sufficient evidence in the record to support both McGhee's conviction for first degree murder and the jury's finding that McGhee was not insane at the time he shot Lowry. As such, the judgment of the district court is affirmed.

AFFIRMED.

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SHAYNE MURPHY, APPELLANT, V.
CITY OF GRAND ISLAND, APPELLEE.
742 N.W.2d 506

Filed December 14, 2007. No. S-07-087.

1. **Workers' Compensation: Appeal and Error.** On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. ____: ____. Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
3. **Workers' Compensation: Proof.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
4. ____: ____. In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act.
5. **Workers' Compensation.** Whether an injury arose out of and in the course of employment must be determined from the facts of each case.
6. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, and the factual findings by the compensation court have the same force and effect as a jury verdict in a civil case.
7. **Workers' Compensation: Appeal and Error.** When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.

Appeal from the Workers' Compensation Court. Affirmed.

Mandy L. Strigenz, of Sibbernsen & Strigenz, P.C., for appellant.

James D. Hamilton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for EMC Insurance Companies on behalf of appellee City of Grand Island.

Patrick B. Donahue and Dennis R. Riekenberg, of Cassem, Tierney, Adams, Gotch & Douglas, for Travelers Insurance Company on behalf of appellee City of Grand Island.

Paul F. Prentiss and Benjamin E. Maxell, of Timmermier, Gross & Prentiss, for London GI Program on behalf of appellee City of Grand Island.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

## NATURE OF CASE

Shayne Murphy began working as a firefighter and emergency medical technician (EMT) for the City of Grand Island (City) in 1982. In 2002, he tested positive for hepatitis C, and he commenced an action against the City in the Nebraska Workers' Compensation Court. A single judge of the compensation court dismissed Murphy's claim, citing insufficient evidence of causation that the hepatitis C arose out of and in the course of his employment. A three-judge review panel of the compensation court affirmed the trial court's decision. Murphy appeals. The issue is whether there was sufficient evidence to establish that Murphy contracted hepatitis C in the scope and course of his employment with the City.

## SCOPE OF REVIEW

[1] On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

## FACTS

As part of Murphy's employment as a firefighter and EMT, he assisted ambulances on emergency response calls. He performed CPR, applied bandages, administered oxygen, and provided other medical services.

Murphy received additional EMT training in 1984 and 1985 and, thereafter, spent 70 percent of his time serving as an EMT. He often had direct contact with patients, estimating that he came into physical contact with at least 1 patient on each work shift and sometimes as many as 10. Murphy testified he remembered times he was exposed to bodily fluids.

The City implemented its current safety procedures and protocol for emergency personnel in approximately 1990. These procedures, commonly referred to as "universal precautions," require EMT personnel to wear latex gloves and sometimes goggles to prevent exposure to the bodily fluids of a patient. When the City implemented the precautions, it also began requiring emergency personnel to prepare incident reports, which described when personnel were exposed to a patient's bodily fluids.

Murphy submitted three separate incident reports. The first occurred on September 13, 1990, when a patient was combative and began vomiting and spitting on the ambulance crew. Blood was mixed with the saliva, and the patient's mouth and tongue were bleeding. The incident report showed that Murphy washed his hands and arms with soap and Clorox and that he was wearing latex gloves, but that the patient's bodily fluids may have come into contact with his eyes. Murphy did not remember specifically getting blood in his eyes, nose, or mouth, and his skin was intact at the time of the incident. Murphy did not know if the patient was infected with hepatitis C.

The second incident occurred on May 18, 1991, while Murphy was treating a patient who was gurgling and exhaling blood. Blood got onto Murphy's face, hands, and forearms. He washed his hands with "Clorox water" and was wearing gloves during the exposure, although one glove had a hole in it. The patient's bodily fluids possibly came in contact with Murphy's eyes. He did not know if the patient was infected with hepatitis C.

The third incident occurred September 11, 1992. Murphy was treating a surgical patient whose sutures had broken loose, causing the patient to bleed profusely from her femoral artery. Blood spattered onto Murphy's face, under his gloves, and on his arms, but his skin was intact. He washed his hands with "ER blood spill solution." He did not know if the patient was infected with hepatitis C.

In 2002, Murphy tested positive for hepatitis C. He initiated this lawsuit against the City in the Workers' Compensation Court, claiming that his contraction of hepatitis C arose out of and in the course of his employment with the City.

At trial, evidence was presented that Murphy had engaged in a number of activities over the course of his life that might have exposed him to hepatitis C. These activities included his participation in "Golden Gloves" boxing and football. Murphy was frequently exposed to blood, saliva, and other fluids of his boxing opponents and his teammates. Murphy also underwent arthroscopic surgery to repair a knee following a football-related injury. He was unsure whether he had received a blood transfusion during the surgery.

Murphy offered medical evidence from Drs. Michael F. Sorrell and John A. Wagoner, Jr. Sorrell opined that Murphy's hepatitis C was the result of his employment as an EMT with the City. Sorrell's opinion was based on the assumption that Murphy did not have any risk factors for hepatitis C other than his work. The facts considered by Sorrell were that Murphy was in a monogamous relationship with his wife and she tested negative for hepatitis C and that Murphy had never used intravenous drugs, had never been tattooed or pierced, had normal renal function, had never had dialysis, and had never received a blood transfusion.

Murphy also offered medical evidence from Wagoner in the form of a medical record in which Wagoner noted that Murphy's hepatitis C dated to an incident which was documented in 1990, where he experienced a "blood splash/spill and exposure." Wagoner did not provide a basis for his statement except to note that he had had a "lengthy discussion" with Murphy.

The City offered a report from Dr. Marvin J. Bittner, who stated that he could not conclude with a reasonable degree of

medical certainty that Murphy had acquired hepatitis C as the result of his work as an EMT. Bittner was also of the opinion that no other doctor could conclude that Murphy's hepatitis C was caused by his employment. Bittner opined that many risk factors could not be eliminated. The evidence showed that Murphy had engaged in high-risk activities, described above, that may have exposed him to hepatitis C, and Murphy could not say that patients he came into contact with were infected with hepatitis C.

After reviewing the evidence, the trial judge found that the evidence was insufficient to prove that Murphy had acquired hepatitis C during the scope and course of his employment. Murphy appealed to a three-judge review panel, which affirmed the trial court's decision, and Murphy now appeals to this court.

## ASSIGNMENTS OF ERROR

Murphy assigns two errors: (1) The Workers' Compensation Court erred in ruling that causation should be decided in favor of the City and dismissing his action and (2) the compensation court erred in relying on the medical testimony of Bittner.

## ANALYSIS

We must determine whether the Workers' Compensation Court was clearly wrong in finding that Murphy failed to prove that he contracted hepatitis C during the scope and course of his employment with the City.

[2,3] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Id.*

The trial court's opinion addressed the arguments that Murphy now makes on appeal. It was undisputed that Murphy had tested positive for hepatitis C, and it was known that hepatitis C could be contracted through various means and sources. According to the Centers for Disease Control and Prevention, the possible sources included intravenous drug use, 60 percent; sexual contact, 15 percent; blood transfusion, 10 percent; occupational, 4 percent; other, 1 percent; and unknown, 10 percent.

The court stated that Murphy had failed to establish that he was ever exposed to a patient who was infected with hepatitis C. When Murphy was exposed to blood or bodily fluids during his employment, there was no evidence of piercing of his skin by a sharp object, nor was there any persuasive evidence that blood was splashed onto a portion of his skin which was broken, cut, or otherwise presented an open entry point. The court noted that the incident reports submitted by Murphy indicated that his skin was intact and that he was possibly exposed via his natural body openings (nose, eyes, or mouth). However, Murphy could not affirmatively state that such was in fact the case. The court concluded that although Murphy was engaged in an occupation which obviously provided a risk for exposure, he was unable to provide any evidence whatsoever that he came in contact with the blood or bodily fluids of an individual infected with hepatitis C. The court noted that Murphy's case was further complicated by the fact that he had other significant risk factors outside his employment in which he was possibly exposed.

The court relied upon the opinion of Bittner, who stated that he could not reach a conclusion with a reasonable degree of medical certainty that Murphy had acquired hepatitis C as the result of his work as an EMT for the City and that he did not believe any other physician could reach that conclusion with a requisite degree of certitude.

The court opined that in the end, the case came down to a matter of proof and persuasion. Murphy had offered proof on the issue of causation in the form of an opinion by Sorrell, but the court was not ultimately persuaded. It could not dismiss the fact that there was no evidence that Murphy had ever been exposed on the job to the blood or bodily fluids of an individual who was infected with hepatitis C. The court stated that

Murphy's "occupational exposures" did not indicate that blood touched anything but intact skin and only "'possibly'" came into contact with his mucous membranes. The court concluded that at best, Murphy's evidence established he was in an occupation involving a higher exposure risk to hepatitis C than other jobs and that this proof was not enough.

Murphy argues that his occupation as an EMT placed him at greater risk of contracting hepatitis C. In support, Murphy relies upon Neb. Rev. Stat. § 71-514.01 (Reissue 2003), which provides in part: "The Legislature hereby finds that health care providers are at risk of significant exposure to the blood and other body fluids of patients as a result of their work." According to Murphy, this statute implies the Legislature has recognized that health care workers are at greater risk for infectious disease and, thus, hepatitis C should be considered an occupational disease. Murphy claims that such an adjudication would change the burden of proof placed upon him and he would not be required to prove the exact date and time that he contracted hepatitis C.

However, Murphy's argument fails to recognize that the problem was not that he failed to prove the date and time he contracted hepatitis C but that he failed to prove it was more likely than not that he contracted hepatitis C during the scope and course of his employment with the City. This was a fact that Murphy was required to prove, and the trial court found that he did not.

[4] In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004).

[5,6] Whether an injury arose out of and in the course of employment must be determined from the facts of each case. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003). In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to

the successful party, and the factual findings by the compensation court have the same force and effect as a jury verdict in a civil case. *Worline v. ABB/Alstom Power Int. CE Servs.*, 272 Neb. 797, 725 N.W.2d 148 (2006). See, also, *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005).

In the case at bar, both sides presented evidence of how they believed Murphy contracted hepatitis C. It was within the trial court's discretion to determine which evidence was more persuasive.

Murphy next argues that the court erred in relying on the testimony of Bittner over that of Sorrell and Wagoner. Bittner's opinion stated that he could not conclude with a reasonable degree of medical certainty that Murphy had acquired hepatitis C as the result of his work for the City. Evidence from Sorrell and Wagoner stated that Murphy contracted hepatitis C as a result of his employment with the City.

It is Murphy's position that the evidence of Sorrell and Wagoner established to a reasonable degree of medical certainty that Murphy's hepatitis C was the result of his employment as an EMT for the City. However, Sorrell's opinion was based on the belief that Murphy had no risk factors for hepatitis C other than his work. The trial court noted that Murphy had many risk factors for hepatitis C other than his work, including contact with blood while engaged in football and boxing. Furthermore, Wagoner's notation was based on nothing more than a "lengthy discussion" with Murphy and was merely found within a medical record.

[7] When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Worline v. ABB/Alstom Power Int. CE Servs., supra.* It was within the discretion of the trial court to have concluded that Sorrell's and Wagoner's opinions were based upon faulty or incomplete information and to therefore decline to accept their conclusions. Bittner's opinion stated that he could not conclude with a reasonable degree of medical certainty that Murphy had contracted hepatitis C as the result of his work as an EMT. Bittner based his opinion on the fact that many risk factors could not be eliminated. The court pointed out that all the

experts were eminently qualified, but it was entirely within the court's authority to determine that Bittner's opinion was more credible. We decline to substitute our judgment for that of the trial court in accepting Bittner's opinion over that of Sorrell and Wagoner.

## CONCLUSION

For the reasons set forth above, we conclude that the Workers' Compensation Court did not err in finding insufficient evidence of causation. We therefore affirm the judgment of the Workers' Compensation Court review panel, which affirmed the judgment of the trial court.

AFFIRMED.

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# IN RE INTEREST OF KEVIN K., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. KEVIN K. AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES.

742 N.W.2d 767

Filed December 21, 2007. No. S-06-447.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Juvenile Courts: Minors: Jurisdiction.** Where a juvenile is adjudicated solely on the basis of habitual truancy from school pursuant to Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2004), and the status of truancy is subsequently terminated by the lawful execution of a parental release authorizing discontinuation of school enrollment pursuant to Neb. Rev. Stat. § 79-201(3)(d) (Cum. Supp. 2006), a juvenile court may terminate its jurisdiction without a finding that such termination is in the best interests of the juvenile.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, LINDA S. PORTER, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Kara E. Mickle and Alicia B. Henderson, Deputy Lancaster County Attorneys, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Elizabeth Elliott, for appellee Kevin K.

Jon Bruning, Attorney General, and B. Gail Steen, Special Assistant Attorney General, for appellee Nebraska Department of Health and Human Services.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Applying a best interests test, a divided panel of the Nebraska Court of Appeals held in this case that the separate juvenile court of Lancaster County erred in terminating its jurisdiction of a juvenile previously adjudicated for habitual truancy.[1] After the juvenile reached the age of 16, his mother authorized discontinuance of his enrollment in school pursuant to Neb. Rev. Stat. § 79-201 (Cum. Supp. 2006). On further review, we conclude that because the lawful discontinuation of school enrollment necessarily ended the juvenile's status as a truant, which was the sole basis for his adjudication, the juvenile court did not err in concluding that it was no longer necessary or appropriate to exercise its jurisdiction.

## BACKGROUND

The State of Nebraska, through the Lancaster County Attorney, commenced this juvenile proceeding by filing a truancy petition in the separate juvenile court on March 22, 2005. The State alleged that Kevin K. had been truant from school on various dates in January and February 2005. Kevin, born on August 21, 1989, was 15 years old when the action was commenced. He resided with his mother in Lincoln, Nebraska.

At an adjudication hearing on April 22, 2005, Kevin admitted the allegations of truancy in his mother's presence and with her consent. He was adjudicated pursuant to Neb. Rev. Stat.

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[1] *In re Interest of Kevin K.*, 15 Neb. App. 641, 735 N.W.2d 812 (2007).

§ 43-247(3)(b) (Reissue 2004) based upon a finding by the juvenile court that he had been habitually truant from school as alleged in the petition. The juvenile court placed Kevin in the temporary legal custody of the Nebraska Department of Health and Human Services (DHHS) and ordered that he participate in a summer school program if it could be arranged by DHHS and that he cooperate with any evaluations arranged by DHHS. Following a disposition hearing at which it received and considered a report and evaluation submitted by DHHS, the juvenile court entered an order on July 14, 2005, in which it concluded that "returning legal custody to the parent would be contrary to the welfare of the child at this time due to the need to monitor Kevin's school attendance and to provide supportive services to Kevin to assist him in correcting his truancy problem while residing in his parent's home." The court ordered Kevin to continue in the temporary legal custody of DHHS "for placement, treatment and care" while remaining in the physical custody of his mother. The order further provided that Kevin was to "attend all scheduled classes without any truancies or tardies" and that "[a]ny illnesses shall be verified through a medical provider, school nurse or health paraprofessional." Kevin's mother was ordered not to "excuse Kevin . . . from school without prior approval" of DHHS.

On November 21, 2005, Kevin filed a motion to terminate jurisdiction. He alleged that after he reached the age of 16 on August 21, his mother signed a release pursuant to § 79-201(3)(d) which discontinued his enrollment in school effective November 3. At a hearing on the motion, the DHHS caseworker assigned to Kevin's case requested that "the case be closed" because Kevin was no longer in school and there were no further services which DHHS could provide to him. The caseworker testified that Kevin's mother discussed the release with the caseworker before signing it, explaining that she wanted to give Kevin a fresh start by allowing him to enroll in a GED program or find a job. At the time of the hearing, Kevin had done neither. The caseworker testified that he tried to discourage Kevin's mother from authorizing discontinuation of Kevin's school enrollment because he believed that remaining in school would be in Kevin's best interests; but he told

her that if she decided to do so, DHHS would ask the juvenile court to terminate jurisdiction. The caseworker testified that Kevin's mother did not need DHHS' permission to authorize discontinuation of Kevin's school enrollment when he reached the age of 16.

Kevin's mother testified that she decided to withdraw Kevin from school so that he could "explore his other options." She confirmed that despite her urging, Kevin had not enrolled in a GED program or obtained employment. Kevin testified that he planned to get a job, but had not been "in a hurry" to find one.

The juvenile court found that Kevin's best interests would not be served by a termination of jurisdiction because he "has no daily program, is not enrolled in a GED program, is not employed and indeed has no significant work history whatsoever." Referring to one of the purposes of the Nebraska Juvenile Code, the court noted that Kevin's situation "does not bode well for his 'development of his capacity for a healthy personality, physical well-being, and useful citizenship and to protect the public interest.'"[2]

However, the court concluded that a best interests standard did not apply to the termination of its jurisdiction in this case because the provision of § 79-201(3)(d) permitting a parent or custodian to authorize discontinuation of enrollment in school at the age of 16 "in effect negates his or her status or definition as a 'habitually truant' juvenile over whom the court should exercise jurisdiction under Neb. Rev. Stat. Section 43-247 (3)(b)." The court noted that this provision of the compulsory education statute made no exception for juveniles under the jurisdiction of the juvenile court and used broad language in authorizing a "parent or legal guardian" to discontinue school enrollment when the child reached the age of 16. The juvenile court concluded:

> [W]hen a youth, by virtue of a parent's exercise of a right granted by the State of Nebraska, has been lawfully withdrawn from school and is no longer legally required to be enrolled in school, it is no longer necessary nor appropriate

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[2] See Neb. Rev. Stat. § 43-246(1) (Reissue 2004).

> for the Court to exercise jurisdiction in a case based solely upon the youth's truancy.

The State, through the Lancaster County Attorney, appealed this decision to the Nebraska Court of Appeals. DHHS appeared as an appellee and argued that the decision of the juvenile court was correct and should be affirmed. In its majority opinion reversing the juvenile court's decision, the Court of Appeals reasoned that the Nebraska Juvenile Code "does not set forth that the factual basis justifying the juvenile court's acquisition of jurisdiction must continue to exist throughout the duration of the juvenile court's exercise of that jurisdiction."[3] Noting that Kevin remained a minor, and relying in part on an Illinois Court of Appeals' decision,[4] the majority reasoned that a best interests test should be applied. Adopting the findings of the juvenile court in its de novo review, the majority concluded that termination of jurisdiction was not in Kevin's best interests. It reversed, and remanded to the juvenile court for further proceedings.

A dissenting judge noted that the decision of the majority had the effect of placing a limitation on the statutory right of a parent to authorize discontinuance of a 16-year-old child's school enrollment "by excluding children who are under the jurisdiction of the juvenile court."[5] The dissent reasoned that while such a limitation may be appropriate, "it is for the Legislature, and not the courts, to make this decision."[6] The dissent concluded that because Kevin's mother had authorized discontinuation of his school enrollment, Kevin could no longer be considered truant, and that the sole basis for the exercise of the juvenile court's jurisdiction had ceased to exist.

We granted a petition for further review filed jointly by Kevin and DHHS.

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[3] *In re Interest of Kevin K., supra* note 1, 15 Neb. App. at 645, 735 N.W.2d at 816.

[4] *In Interest of C.W.*, 292 Ill. App. 3d 201, 684 N.E.2d 1076, 226 Ill. Dec. 80 (1997).

[5] *In re Interest of Kevin K., supra* note 1, 15 Neb. App. at 647, 735 N.W.2d at 817 (Moore, Judge, dissenting).

[6] *Id.*

## ASSIGNMENT OF ERROR

Kevin and DHHS contend, restated, that the Nebraska Court of Appeals erred in concluding that § 43-247 requires a juvenile court to retain jurisdiction over a minor who has been adjudicated as habitually truant from school, but is subsequently withdrawn from school by a parent pursuant to § 79-201(3)(d).

## STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.[7]

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[8]

## ANALYSIS

Like any juvenile truancy case, this appeal involves the interplay between the Nebraska Juvenile Code and Nebraska's compulsory education statutes. Under the code, a juvenile court may exercise jurisdiction over a juvenile who is "habitually truant from . . . school,"[9] but neither the code nor the compulsory education statutes define the term "truant." In *In re Interest of K.S.*,[10] this court held that "the mere fact that the child is not complying with the compulsory education laws without being first excused by school authorities establishes truancy" and, accordingly, jurisdiction under the truancy provisions of the Nebraska Juvenile Code. We further noted in that case that under the compulsory attendance law then in effect, only school authorities had authority to grant permission to be absent, and that thus, parental consent to an absence of a child who was legally required to attend school did not alter the fact of truancy.

Due to a subsequent amendment in the compulsory school attendance statutes, this principle no longer applies in the case of certain children who have not reached the mandatory

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[7] *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007).

[8] *Jones v. Shelter Mut. Ins. Cos.*, *ante* p. 186, 738 N.W.2d 840 (2007).

[9] § 43-247(3)(b).

[10] *In re Interest of K.S.*, 216 Neb. 926, 931, 346 N.W.2d 417, 420 (1984).

attendance age. Prior to 2004, Nebraska law made school attendance mandatory for any child "who is not less than seven years of age and not more than sixteen years of age."[11] In 2004, the compulsory attendance law was amended to make school attendance mandatory for children between the ages of 6 and 18 who have not obtained a high school diploma or completed a program of instruction in certain schools, subject to a parental right to withdraw a child from school when he or she reaches the age of 16.[12] The law now provides that school attendance is not mandatory where a child "[h]as reached the age of sixteen years and such child's parent or guardian has signed a notarized release discontinuing the enrollment of the child on a form provided by the school."[13] There is no statutory restriction on the right of a parent or guardian to authorize discontinuance of school enrollment for children who have reached the age of 16, and the statute makes no specific reference to children who are subject to the jurisdiction of a juvenile court when they reach that age. In its present form, the compulsory education statute can be said to articulate two related principles of public policy: (1) that it is generally in the best interest of children who have not graduated from high school or completed a program of instruction to remain in school until they reach the age of 18 and (2) that parents and guardians have an unqualified right to determine whether this general principle should apply to their 16- and 17-year-old children.

By adjudicating Kevin as a habitual truant, the juvenile court obtained jurisdiction over his mother as well.[14] Although the court ordered her not to excuse Kevin from school without prior approval of DHHS, we do not read this provision of the dispositional order as prohibiting Kevin's mother from exercising her statutory right to discontinue his school enrollment when he reached the age of 16, and we do not reach the issue of whether a juvenile court could lawfully impose such a restriction. The record reflects no judicial determination that Kevin's mother

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[11] § 79-201 (Reissue 2003).

[12] 2004 Neb. Laws, L.B. 868, § 1.

[13] § 79-201(3)(d) (Cum. Supp. 2006).

[14] See § 43-247(5).

was unfit or legally incompetent at the time she executed the release authorizing the discontinuance of Kevin's enrollment in school. On the effective date of the release, Kevin was no longer subject to the compulsory school attendance statutes, and as a matter of law, he was no longer truant.

Truancy is not a crime, and juveniles who are adjudicated as habitually truant under § 43-247(3)(b) are considered "[s]tatus offenders" under the Nebraska Juvenile Code.[15] Kevin's status changed when his mother lawfully authorized discontinuation of his enrollment in school. Although he was still a juvenile within the meaning of the code, he was not and could never again be truant, because he was no longer subject to the compulsory education statutes. The Nebraska Juvenile Code provides that a juvenile court's jurisdiction over an adjudicated individual "shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction."[16] There is no statutory requirement that in all cases, termination of jurisdiction must be shown to be in the best interests of the juvenile.

[3] We hold that where a juvenile is adjudicated solely on the basis of habitual truancy from school pursuant to § 43-247(3)(b), and the status of truancy is subsequently terminated by the lawful execution of a parental release authorizing discontinuation of school enrollment pursuant to § 79-201(3)(d), a juvenile court may terminate its jurisdiction without a finding that such termination is in the best interests of the juvenile. We agree with the determination of the juvenile court that under the circumstances presented in this case, it is neither necessary nor appropriate to continue to exercise its jurisdiction.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and this matter is remanded to that court with directions to affirm the judgment of the juvenile court terminating its jurisdiction in this case.

REVERSED AND REMANDED WITH DIRECTIONS.

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[15] Neb. Rev. Stat. § 43-245(15) (Reissue 2004).

[16] § 43-247.

## PAMELA JOANN GRESS, APPELLEE AND CROSS-APPELLANT, V. PATRICK RAYMOND GRESS, APPELLANT AND CROSS-APPELLEE.

743 N.W.2d 67

Filed December 21, 2007. No. S-06-607.

1. **Child Custody: Property Division: Child Support: Alimony.** Domestic matters such as child custody, division of property, child support, and alimony are entrusted to the discretion of trial courts.
2. **Appeal and Error.** A trial court's determinations on domestic matters are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
3. **Judgments: Appeal and Error.** In reviewing orders on domestic matters, an appellate court conducts its own appraisal of the record to determine whether the trial court's judgments are untenable such as to have denied justice.
4. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Child Support: Alimony.** A party's alimony obligation is to be set according to the income he or she has available after his or her child support obligations, if any, have been accounted for.
6. **Child Support.** Before determining an individual's child support obligation, the trial court must identify the monthly incomes for both the custodial and noncustodial parents.
7. **Child Support: Taxation.** As a general matter, in the determination of child support, income from a self-employed individual is determined by looking to that person's tax returns.
8. **Modification of Decree: Child Support: Proof.** A party can modify a prior child support order by showing that there has been a material change in circumstances since the court's prior order.
9. **Modification of Decree: Child Support: Rules of the Supreme Court: Proof.** A party who seeks to have a prior child support order modified can prove that a modification is warranted simply by a showing of the conditions described in paragraph Q of the Nebraska Child Support Guidelines.
10. **Child Support: Rules of the Supreme Court.** As a general matter, child support obligations should be set according to the provisions of the Nebraska Child Support Guidelines.
11. ____: ____. A court may deviate from the Nebraska Child Support Guidelines, but only if it specifically finds that a deviation is warranted based on the evidence.
12. ____: ____. Absent a clearly articulated justification, any deviation from the Nebraska Child Support Guidelines is an abuse of discretion.
13. **Child Support.** In determining child support, a court's findings regarding an individual's level of income should not be based on the inclusion of income that is entirely speculative in nature.

14. ____. A court's findings regarding the propriety of child support obligations should not be based on costs that are entirely speculative.
15. **Modification of Decree: Child Support.** Changes in the financial position of the parent obligated to pay support often warrant a modification of the support order.
16. ____: ____. Regarding child support, increased financial obligations, like decreased income, will qualify as a change in one's financial position.
17. **Social Security: Minors: Intent.** The federal government provides Social Security to special needs children with the intent that it will supplement other income, not substitute for it.
18. **Alimony.** The test for the propriety of an alimony award is whether it is reasonable in light of the parties' circumstances.
19. **Alimony: Rules of the Supreme Court: Presumptions.** An alimony award which drives the obligor's income below the basic subsistence limitation set forth in paragraph R of the Nebraska Child Support Guidelines is presumptively an abuse of judicial discretion unless the court specifically finds that conformity with paragraph R would work an unjust or inappropriate result in that particular case.
20. **Alimony.** The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support.
21. ____. Above all else, the duration of an alimony award must be reasonable.

Appeal from the District Court for Otoe County: DANIEL BRYAN, JR., Judge. Affirmed in part, and in part reversed and remanded with directions.

Louie M. Ligouri, of Ligouri Law Office, for appellant.

Stefanie S. Flodman and Steven J. Flodman, of Johnson, Flodman, Guenzel & Widger, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

## I. INTRODUCTION

This action originated as a petition for dissolution of marriage between Pamela Joann Gress and Patrick Raymond Gress. The district court dissolved the marriage between the parties, divided their assets, and ordered Patrick to make monthly child and spousal support payments. Patrick appealed, citing an error in the district court's calculation of child support and alimony. On appeal, we concluded the district court improperly calculated child support. We therefore remanded the cause for further

proceedings, instructing the court to recalculate Patrick's share of child support and to make any necessary changes to the alimony award.[1]

On remand, the district court made a slight reduction in Patrick's child support obligation and reinstated its order that Patrick pay alimony of $1,000 per month for 60 months. Patrick now appeals, once again arguing that the district court erred in setting the amount of his child and spousal support obligations. Pamela cross-appeals, contending the district court erred by limiting alimony to a period of 60 months. For reasons developed in detail below, we affirm the district court's child support order and the duration of the alimony award, but reverse the court's order with regard to the amount of alimony.

## II. BACKGROUND

Because a more thorough statement of facts can be found in our prior opinion,[2] we recount only facts relevant to this appeal. During the marriage, Pamela was a stay-at-home mother while Patrick, a lifelong farmer, worked the family's farm. In September 2003, Pamela petitioned for a divorce. Patrick and Pamela have four children ranging in age from 5 to 17. The youngest of the Gress children was born with Down syndrome.

On December 15, 2004, the district court entered an order which dissolved the marriage, divided the couple's assets and liabilities, and ordered Patrick to pay child support and alimony. Specifically, Patrick was ordered to pay, among other things, child support of $1,285 per month and alimony of $1,000 per month for 60 months. As noted above, Patrick appealed to this court, and after identifying an error in the district court's calculation of depreciation in Patrick's income, we remanded the cause for further proceedings, instructing the court to adjust the amount of Patrick's child support responsibilities. On remand, the court reduced Patrick's child support obligation to $1,224 per month and reinstated its order that Patrick pay Pamela alimony of $1,000 per month for 60 months. Patrick was also

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[1] *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

[2] See *id.*

ordered to pay an "80.5 %" share of any daycare costs. Both parties now appeal.

## III. ASSIGNMENTS OF ERROR

Patrick assigns, restated and renumbered, that the district court erred in calculating Patrick's child support obligation by (1) basing the calculation on an average of his incomes from 2001 through 2003, (2) disregarding paragraph Q of the Nebraska Child Support Guidelines, (3) violating paragraph R of the Nebraska Child Support Guidelines, and (4) failing to take the youngest child's Social Security benefits into consideration. Additionally, Patrick assigns that the district court erred in (5) awarding an unreasonable amount of alimony to Pamela.

In her cross-appeal, Pamela assigns that the district court erred by limiting Patrick's alimony obligation to 60 months.

## IV. STANDARD OF REVIEW

[1-3] Domestic matters such as child custody, division of property, child support, and alimony are entrusted to the discretion of trial courts.[3] A trial court's determinations on such issues are reviewed "de novo on the record to determine whether there has been an abuse of discretion by the trial judge."[4] Under this standard, an appellate court conducts its "own appraisal of the record" to determine whether the trial court's judgments "are untenable such as to have denied justice."[5]

[4] Finally, we note that interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[6]

## V. ANALYSIS

[5] Taken together, the parties' assignments of error concern either the amount of Patrick's child support obligation or the

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[3] See *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

[4] *Gress, supra* note 1, 271 Neb. at 124, 710 N.W.2d at 323. See, also, *Robb, supra* note 3.

[5] *Guggenmos v. Guggenmos*, 218 Neb. 746, 748, 359 N.W.2d 87, 90 (1984).

[6] *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001).

amount and duration of Patrick's spousal support obligation. The Nebraska Child Support Guidelines (hereinafter NCSG) instruct that a party's alimony obligation is to be set according to the income he or she has available *after* his or her child support obligations, if any, have been accounted for.[7] Accordingly, we begin with an analysis of the district court's child support determination, then the alimony award.

### 1. Child Support

Patrick argues that the trial court erred in ordering him to pay $1,224 per month in child support. He offers four distinct reasons why this figure is erroneous. First, Patrick argues that the court erred in averaging his incomes from 2001 through 2003. Patrick contends the court should have used an 8-year average instead or, at the very least, should have included Patrick's income from 2004 in its average. Second, Patrick argues that the district court erred by disregarding paragraph Q of the NCSG in setting child support. Third, Patrick argues that the district court erred by ordering an amount of child support which allegedly violates paragraph R of the NCSG. Finally, Patrick argues that the district court incorrectly ignored the Social Security allowance in setting Patrick's child support obligation. We address each argument in turn in the sections that follow.

#### (a) Income Averaging

[6] In his primary argument, Patrick asserts that the district court erred in averaging his annual income for the purpose of calculating his monthly child support obligation. Before determining an individual's child support obligation, the trial court must identify the monthly incomes for both the custodial and noncustodial parents.[8] As a self-employed farmer, Patrick's income is prone to fluctuations from year to year. The NCSG anticipates this contingency and provides that "[i]n the event of substantial fluctuations of annual earnings of either party during

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[7] Nebraska Child Support Guidelines, paragraph M. See, also, *Gress, supra* note 1.

[8] See *Gress, supra* note 1 (citing *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004)).

the immediate past 3 years, the income may be averaged to determine the percent of contribution of each parent . . . ."[9]

In 2001, Patrick's annual income was $51,654. In 2002, this figure increased to $61,059, only to plummet to $28,400 in 2003. These figures translate to an approximate 18-percent increase from 2001 to 2002, then a 54-percent drop from 2002 to 2003. This is the sort of substantial fluctuation that the NCSG contemplates. Therefore, it was entirely proper for the district court to use income averaging to calculate Patrick's income for child support purposes. Patrick contends, however, that the district court erred by (1) using a 3-year average instead of an 8-year average or, alternatively, (2) not including Patrick's income from 2004 in its average.

*(i) 8-Year Average*

Per Pamela's suggestion, the district court averaged Patrick's annual income from 2001 through 2003 to identify Patrick's income for child support purposes. Averaging these figures gave Patrick an estimated gross income of $47,037 per year, or $3,920 per month. Patrick argues that the court should have used an 8-year average rather than a 3-year average to estimate his income. Using the figures Patrick supplies in his brief for the additional 5 years, an 8-year average would result in an income of $34,065 per year, or $2,839 per month.

In support of his claim that the court should have used an 8-year average, Patrick cites testimony by his tax preparer, Gerald Siefken, a farm tax expert. Siefken testified that farmers' incomes are inherently unpredictable and that it was his practice to use an 8- or 10-year average to calculate farmers' taxes. Patrick emphasizes that his incomes from 2001 and 2002 are some of the highest incomes he has had in recent history. Patrick argues that using those 2 years as two-thirds of the average misrepresents his actual level of income. Relying on Siefken's testimony, Patrick suggests that only an 8-year average will accurately reflect his present level of income. The question, then, is whether the district court abused its discretion by using a 3-year average instead of an 8-year average.

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[9] Nebraska Child Support Guidelines, worksheet 1 (fourth footnote).

We have not yet had occasion to consider the number of years a court should—or must—use when averaging an income pursuant to the NCSG. As stated above, the NCSG provides that in the event of a fluctuation within "the immediate past 3 years, the income may be averaged."[10] This language could be read as indicating that a fluctuation within the prior 3 years should trigger an average of the incomes only from those prior 3 years. On the other hand, it is entirely possible to read this language as standing for the proposition that a fluctuation in the prior 3 years triggers some form of averaging, be it 3 years, 8 years, or some other number.

This was apparently the reading the Nebraska Court of Appeals adopted in *Wagoner v. Tracy*.[11] In *Wagoner*, the court acknowledged that the NCSG "refer[s] to a 3-year average," but nonetheless permitted a 5-year average.[12] The court reasoned that such an average "result[ed] in a more fair representation of [the husband's] income" than a 3-year average.[13] Similarly, the Court of Appeals had allowed a 4-year average in *Hughes v. Hughes*.[14]

Although we previously discussed income averaging in *Peter v. Peter*,[15] that case dealt solely with the threshold question of when averaging is appropriate and did not describe how to actually conduct the average. It is perhaps worth noting, however, that the average at issue in *Peter* was a 3-year average.[16] In fact, *Wagoner* and *Hughes* aside, it appears that income averaging is almost always discussed with reference to a 3-year average in Nebraska.[17]

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[10] *Id.*

[11] *Wagoner v. Tracy*, No. A-05-301, 2006 WL 3487649 (Neb. App. Dec. 5, 2006) (not designated for permanent publication).

[12] *Id.* at *7.

[13] *Id.*

[14] *Hughes v. Hughes*, 14 Neb. App. 229, 706 N.W.2d 569 (2005).

[15] *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

[16] *Id.*

[17] See, e.g., *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Willcock v. Willcock*, 12 Neb. App. 422, 675 N.W.2d 721 (2004); *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003).

A survey of decisions from other jurisdictions reveals a similar pattern. Indiana's child support guidelines expressly recommend a 2- or 3-year average.[18] A number of other courts use 3- or 4-year averages when calculating an obligor's income for child support purposes.[19] It seems that only a few states go as high as a 5-year average. North Dakota expressly allows up to a 5-year average by law,[20] and courts in Iowa and Minnesota have used 5-year averages.[21]

The Iowa Supreme Court's willingness to use a 5-year average is particularly relevant. Similar to Patrick's arguments in this case, a farmer argued before the Iowa Supreme Court that he deserved a 5-year average of his income for child support purposes due to fluctuations inherent in farming incomes. The court agreed.[22] Not all courts go beyond 3 years when faced with highly unpredictable forms of self-employment, however. For example, in *In re Marriage of Nelson*,[23] the Illinois Court of Appeals used a 3-year average for a farmer. Similarly, in *Zimin v. Zimin*,[24] an Alaskan fisherman insisted that only a 10-year average could fairly assess his highly unpredictable income for child support purposes. The Alaska Supreme Court disagreed, concluding that a "three-year average . . . provide[s] an accurate estimate of a parent's current earning capacity when a parent's income is subject to yearly fluctuations."[25]

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[18] See *Lloyd v. Lloyd*, 755 N.E.2d 1165 (Ind. App. 2001).

[19] See, e.g., *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 785 N.E.2d 172, 271 Ill. Dec. 521 (2003) (3-year average); *Roberts v. Roberts*, 924 So. 2d 550 (Miss. App. 2005) (same); *Alexander v. Alexander*, 34 S.W.3d 456 (Tenn. App. 2000) (4-year average); *Fleenor v. Fleenor*, 992 P.2d 1065 (Wyo. 1999) (3-year average).

[20] N.D. Admin. Code 75-02-04.1-05 (2003).

[21] See, *In re Marriage of Robbins*, 510 N.W.2d 844 (Iowa 1994); *Tipler v. Edson*, No. A05-1518, 2006 WL 1390439 (Minn. App. May 23, 2006) (unpublished opinion).

[22] *In re Marriage of Robbins, supra* note 21.

[23] *In re Marriage of Nelson*, 297 Ill. App. 3d 651, 698 N.E.2d 1084, 232 Ill. Dec. 654 (1998).

[24] *Zimin v. Zimin*, 837 P.2d 118 (Alaska 1992).

[25] *Id.* at 123 n.9.

The foregoing compels several conclusions. First, it appears that both here and elsewhere, a 3-year average tends to be the most common approach in cases where a parent's income tends to fluctuate. Second, even among the jurisdictions which permit an average of more than 3 years, courts appear reluctant to use more than a 5-year average. Therefore, even assuming that income averaging under the NCSG is not limited to a 3-year average, the authority from both Nebraska and elsewhere suggests that the district court did not abuse its discretion by declining to use an 8-year average.

It is theoretically possible that the district court could have reached a more accurate assessment of Patrick's current earning capacity by including additional years in its average. However, we believe that the use of a 3-year average in this instance is not so "clearly untenable" that it "unfairly deprives [Patrick] of a substantial right" or denies him "a just result."[26]

*(ii) Annual Income From 2004*

Patrick next argues that the district court erred in failing to include his income from 2004 either in addition to the 3 years the district court selected for its average or as a replacement for one of those years.

[7] As a general matter, in the determination of child support, income from a self-employed individual is determined by looking to that person's tax returns.[27] At trial, tax returns showing Patrick's incomes for 2001 through 2003 were offered and admitted into evidence. It appears that a tax return for 2004 was never offered. This is not surprising, given that the trial was held during 2004.

In addition, we recognize that a party undergoing a divorce may have both the motive and the opportunity to underreport his or her own income.[28] Indeed, Siefken, Patrick's tax preparer, testified that a farmer can easily, and legally, manipulate his or

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[26] See *State v. Anglemyer*, 269 Neb. 237, 242, 691 N.W.2d 153, 159 (2005).

[27] See, *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000) (citing *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994), and Nebraska Child Support Guidelines, paragraph D).

[28] See *Ferguson v. Ferguson*, 357 N.W.2d 104 (Minn. App. 1984).

her income simply by harvesting crops and storing them until the following year. As it turns out, Patrick had unsold grain in his possession while the divorce was pending.

All of the above is not to suggest that Patrick himself has engaged in any intentional efforts to underreport his income. The point is that even if Patrick had supplied information about his income for 2004, the district court had ample justification to view such information with skepticism. Accordingly, the district court did not abuse its discretion by excluding 2004 from its average of Patrick's income.

(b) Paragraph Q

Patrick next argues that the district court erred when it failed to consider paragraph Q of the NCSG. Paragraph Q provides the following:

> Modification. Application of the child support guidelines which would result in a variation by 10 percent or more, but not less than $25, upward or downward, of the current child support obligation, child care obligation, or health care obligation, due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months, establishes a rebuttable presumption of a material change of circumstances.

Patrick quotes a portion of this language in his brief, but fails to explain what difference it makes in his legal position. This likely stems from the fact that paragraph Q is unrelated to the present case.

[8,9] Under Nebraska law, a party can modify a prior child support order by showing there has been a material change in circumstances since the court's prior order.[29] Restated, paragraph Q explains that a material change is presumed if a parent's recalculated child support obligation—using current financial information—would result in a deviation of at least 10 percent over the parent's old obligation, provided the current financial information has been accurate for the prior 3 months and will stay accurate for the next 6 months. As construed by the Court of Appeals, a party who seeks to have a prior child

[29] See *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

support order modified can prove that a modification is warranted simply by a showing of the conditions described in paragraph Q.[30]

We do not see, and Patrick fails to explain, how the presumption created by paragraph Q is relevant. First, this case did not originate as a petition to modify a prior child support order; it is actually the district court's attempt to establish an initial child support order. Second, and relatedly, neither party contends that there has been a material change in circumstances. Accordingly, we see no merit in Patrick's assignment of error involving paragraph Q.

(c) Paragraph R

Patrick next argues the district court erred by ordering a child support obligation which pushes his income below the poverty line. If true, it would contravene paragraph R of the NCSG. In its current form, paragraph R states:

> Basic Subsistence Limitation. A parent's support, child care, and health care obligation shall not reduce his or her net income below the minimum of $851 net monthly for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered as defined in paragraph I above.

This language makes clear that any child support obligation which reduces a parent's net monthly income below $851—the basic subsistence limitation—violates the NCSG, except that a parent may be ordered to pay the greater of $50 or 10 percent of his or her net income per month.

[10-12] As a general matter, child support obligations should be set according to the provisions of the NCSG.[31] A court may deviate from the guidelines, but only if it specifically finds that a deviation is warranted based on the evidence.[32] Absent a clearly articulated justification, any deviation from the NCSG is

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[30] See *Sneckenberg v. Sneckenberg*, 9 Neb. App. 609, 616 N.W.2d 68 (2000).

[31] See *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000).

[32] See *id.*

an abuse of discretion.[33] The district court never indicated that a deviation from paragraph R was warranted. Therefore, the court abused its discretion if its child support order drives Patrick's income below the poverty line set forth in paragraph R.

Based on the income figures supplied for 2001 through 2003, the district court found Patrick's current gross income was $47,037 per year, or $3,920 per month. After taxes, this leaves Patrick with a net monthly income of $2,657.85. From this amount, Patrick was ordered to pay $1,224 per month in child support. That leaves Patrick with $1,433.85 per month, an amount well above the current poverty line.

This is not the end of the inquiry, however, because the district court burdened Patrick with other potential child support obligations in addition to his monthly support payments. Pursuant to paragraph O of the NCSG, Patrick was ordered to pay "80.5 %" of any daycare costs for the children. This daycare obligation is also subject to paragraph R's basic subsistence limitation.[34]

At the outset, we note our suspicion that the district court meant to order Patrick to pay *79.75* percent of future child support costs, rather than 80.5 percent. Our belief is predicated on the fact that 80.5 percent is roughly the amount of child support Patrick was responsible for under the district court's original order that we reversed on appeal. Pursuant to our remand, Patrick's recalculated child support responsibility is 79.75 percent. As a result, we believe the district court intended to require Patrick to pay 79.75 percent, not 80.5 percent, of any daycare costs.

Regardless of the precise proportion, there is nothing in the record to help identify what these costs will be in actual dollars. Although it is certainly possible that paying his share of daycare will reduce Patrick's income below the poverty line, the lack of concrete numbers makes it difficult, if not impossible, to

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[33] See *Gress, supra* note 1. See, also, *In re Marriage of Mellott*, 32 Kan. App. 2d 1031, 93 P.3d 1219 (2004).

[34] Nebraska Child Support Guidelines, paragraph R. See, also, *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005) (citing *Kearney v. Kearney*, 11 Neb. App. 88, 644 N.W.2d 171 (2002)).

say for sure. The speculative nature of Patrick's daycare obligations renders it unnecessary for us to comment on whether the court's order violates paragraph R.

[13,14] We have previously held that a "court's findings regarding [an individual's] level of income should not be based on the inclusion of income that is entirely speculative in nature."[35] This principle works equally well in reverse, such that a court's findings regarding the propriety of child support obligations should not be based on costs that are entirely speculative. In the absence of concrete facts, we decline to consider at this juncture whether Patrick's obligation to pay a sizable portion of his children's daycare costs violates paragraph R.

[15,16] Of course, our decision does not mean that Patrick must suffer daycare costs that exceed his earning capacity. This is because "changes in the financial position of the parent obligated to pay support" often warrant a modification of the support order.[36] Ordinarily, such changes arise when the obligor's income is increased or decreased substantially. Obviously, increased financial obligations, like decreased income, also qualify as a change in one's financial position. As a result, if Patrick is ever forced to pay for daycare and his income is reduced below the poverty line as a result, Patrick may seek a modification of the court's child support order. But until the daycare costs materialize, Patrick's claim that such expenses will drive his income below the poverty line is too speculative to adjudicate.

Patrick advances another paragraph R argument with regard to his duty to pay 80.5 percent of the children's medical, opthalmological, and orthodontic/dental care costs which are not covered by insurance and exceed $480 per year. As with daycare costs, such health care costs are also subject to paragraph R.[37]

In responding to Patrick's argument, we first note that Patrick's medical care obligation was mentioned only in the district court's original order of December 15, 2004. The

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[35] *Stuczynski v. Stuczynski*, 238 Neb. 368, 374, 471 N.W.2d 122, 126 (1991).

[36] *Rauch, supra* note 29, 256 Neb. at 261, 590 N.W.2d at 174.

[37] See, Nebraska Child Support Guidelines, paragraph R; *Kearney, supra* note 34.

court's subsequent order, issued in response to our remand, mysteriously lacks any such obligation. Further, the new order expressly states that the December 15 order is to remain in full effect "except for child support and alimony as redetermined herein." In our view, this means Patrick is not obligated to pay a proportional share of the children's health care costs, a result we believe may have been accidental. Nevertheless, we conclude that even if Patrick was obligated to pay for such health care costs, these costs, like the costs for daycare, are entirely speculative. It is therefore inappropriate for this court to determine whether the imposition of such costs would violate paragraph R at this time.

In sum, Patrick's monthly child support responsibility of $1,224 does not, by itself, violate paragraph R of the NCSG. Patrick's additional obligations—daycare and, potentially, health care—may drive his income below the poverty line. Because the costs associated with those obligations are speculative at this point, we hold that the district court's child support order was not an abuse of discretion.

(d) Social Security Benefits

Patrick next argues the district court erred in disregarding Social Security benefits paid on behalf of the youngest of the Gress children when calculating Patrick's child support obligation. To refresh, the youngest of the Gress children was born with Down syndrome. As a result, the child receives $564 per month in Social Security benefits from the federal government. Citing the Nebraska Court of Appeals' opinion in *Ward v. Ward*,[38] Patrick argues that his child support obligation should be reduced in light of the Social Security benefits.

In *Ward*, a child began receiving Social Security benefits after her adoptive mother passed away. The child's adoptive father remarried, and his second wife also adopted the child. At issue in *Ward* was whether the child's Social Security benefits should offset some of the money each parent owed in child support. The Court of Appeals held that it should offset child support, and it reduced the amount of each parent's obligation by a

[38] *Ward v. Ward*, 7 Neb. App. 821, 585 N.W.2d 551 (1998).

proportion of the Social Security payment equal to that parent's share of the child support needs.[39]

Patrick's suggestion that the same be done in this case would substantially reduce his obligation. The district court found the total support obligation of the Gress children to be $1,535 per month. Patrick, based on his income, is responsible for 79.75 percent of that sum, or $1,224. If the $564 in Social Security benefits is taken into account, the total support obligation for the Gress children would be reduced from $1,535 to $971. Patrick's 79.75-percent share would be $774.

In response to Patrick's request that we apply *Ward* to these facts, Pamela urges us to overrule that decision. We choose neither option. Instead, we hold that whatever merit *Ward* may have in other contexts, the case is not applicable here. For one, we note that *Ward* involved a single child. It seems far less appropriate to offset support obligations for *four* children in light of one child's Social Security benefits.

[17] Second, and more important, it is well established that children with actual disabilities like Down syndrome have special needs above and beyond the needs of most children.[40] All children have support needs, but special-needs children require additional financial support to overcome developmental, cognitive, or physiological problems. With this in mind, the federal government provides Social Security to such children with the intent that it will "supplement other income, not substitute for it."[41] In contrast, the money allocated to the youngest child under the NCSG is meant to provide for the basic needs all children have. To construe one source of money as satisfying both needs would leave either his basic or his special needs unfulfilled.

*Ward*, in contrast, did not present such a situation. Unlike a child with a disability, a child who loses a parent at a young age does not necessarily have special needs that will lead to increased support costs. In that context, Social Security benefits

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[39] *Id.*

[40] H.R. Rep. No. 92-231 (1971), 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4989.

[41] *Kyle v. Kyle*, 582 N.E.2d 842, 846 (Ind. App. 1991).

are intended to account for the fact that the child has lost a source of support for his or her basic needs. Using Social Security benefits to offset a portion of child support costs is not necessarily a problem under the circumstances presented by *Ward*. However, it is not appropriate to offset child support costs where, as here, the Social Security benefits are intended to mitigate the additional costs that accompany disabilities. As a result, the district court did not abuse its discretion when it disregarded the Social Security benefits.

### 2. Alimony

The remaining assignments of error concern the propriety of the district court's order that Patrick pay Pamela alimony of $1,000 per month for 60 months. Patrick questions the reasonableness of the amount, while Pamela agrees with the amount but argues that alimony should continue beyond 60 months.

#### (a) Amount

In his final assignment of error, Patrick contends the district court erred in awarding Pamela an unreasonable amount of alimony. His primary contention is that the alimony amount is unreasonable because paying alimony and child support would drive his income below the basic subsistence limitation expressed in paragraph R of the NCSG. Alternatively, Patrick argues that the district court's award is unreasonable under the circumstances.

[18] Ordinarily, the test for the propriety of an alimony award is whether it is reasonable in light of the parties' circumstances.[42] Patrick suggests that the amount of an alimony award should be regarded as presumptively unreasonable if it would drive a party's income below the poverty line. We agree.

Although paragraph R of the NCSG speaks only to child support, we are persuaded that the basic subsistence limitation in that paragraph should apply with equal force in the alimony context. As a purely logical matter, this conclusion is buttressed by the structure of the NCGS itself. As noted above, paragraph M of the NCSG mandates that alimony be drawn from whatever

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[42] Neb. Rev. Stat. § 42-365 (Reissue 2004).

income is left *after* child support obligations have been determined.[43] Prioritizing child support over alimony indicates that of the two, child support is the more important support interest. So if child support cannot drive an obligor's income below the poverty line unless specifically warranted,[44] then a fortiori, alimony should also not be allowed to drive an obligor's income below the poverty line unless specifically warranted.

The idea that an alimony award may be regarded as unreasonably high if it impoverishes the obligor spouse finds some support from courts outside Nebraska.[45] Moreover, West Virginia has a statute discouraging alimony awards which, when combined with child support and other similar obligations, drive a party's income below the federal poverty line.[46] We read these authorities as providing some support for our conclusion that an alimony award which drives the obligor's income below the basic subsistence limitation set forth in paragraph R of the NCSG is an abuse of judicial discretion unless the court specifically finds that such an award is warranted based on the evidence.

[19] To be clear, our holding on alimony should be read as a mirror of our holding on child support under paragraph R. As such, we believe an alimony award which drives an obligor's net income below the basic subsistence limitation of paragraph R is presumptively an abuse of judicial discretion unless the court specifically finds that conformity with paragraph R would work an "unjust or inappropriate" result in that particular case.[47]

Of course, the parallel between child support and alimony awards means that an obligor's "income" available for alimony purposes is not necessarily synonymous with taxable income.[48] As such, a deviation from the limitation in paragraph R may

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[43] Nebraska Child Support Guidelines, paragraph M.

[44] *Sears, supra* note 31.

[45] See, e.g., *Moore v. Moore*, 242 Mich. App. 652, 619 N.W.2d 723 (2000) (per curiam); *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

[46] W. Va. Code Ann. § 48-13-702(b)(8) (LexisNexis 2004).

[47] Nebraska Child Support Guidelines, paragraph C(5).

[48] *Gress, supra* note 1.

be warranted in cases where the obligor spouse's gross income could support the court's preferred alimony award even if his or her taxable income would not. In sum, if the combination of child support and alimony obligations would reduce an obligor's *net* income below the basic subsistence limitation in paragraph R, the trial court must make specific findings of fact that the obligor is capable of paying that amount despite his reported income on tax returns. If such findings are made, the court may award alimony in excess of what would otherwise be allowed under the limit in paragraph R. This, of course, is but one example of a way in which the application of paragraph R's limitation may be inappropriate in a particular case.

After accounting for his monthly child support obligation, Patrick is left with a net income of $1,433.85 per month. The district court's alimony award of $1,000 per month leaves Patrick with a net income of $433.85. This figure is $417.15 below the current poverty line in paragraph R. The district court's order, however, lacks a specific explanation of why an alimony award that goes beyond the limit set in paragraph R is warranted. Therefore, under our holding today, the district court's alimony award would appear to be an abuse of discretion.

Of course, the district court could not have anticipated our decision. As such, the lack of a specific declaration that an alimony award of $1,000 is warranted despite its conflict with the limit in paragraph R does not necessarily mean it is not warranted. It may simply mean that the district court did not make such a finding express because, at the time of its order, it was not necessary to do so. Accordingly, we think it prudent to remand this cause back to the trial court so that it may have the opportunity to determine whether an alimony award beyond the limit set forth in paragraph R is warranted. If not, the district court should award Pamela no more than $582.85 per month in alimony.

Because the district court may have abused its discretion by ordering an alimony award that contravenes the basic subsistence limitation of paragraph R, we need not address Patrick's alternative argument that the alimony award is unreasonable under the circumstances.

(b) Duration

[20,21] In her cross-appeal, Pamela argues that the district court erred in terminating her alimony award after 60 months. The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support.[49] Above all else, the duration of an alimony award must be reasonable in light of this purpose.[50]

It would be difficult to say on this record, however, that the district court abused its discretion when it concluded that Pamela will be able to secure sufficient employment after 5 years. Although Pamela disputes that conclusion, she fails to articulate any reason why it is false.

Indeed, in the section of her brief dedicated to a discussion of the alimony award's duration, Pamela merely advances arguments concerning the *amount* of alimony. Pamela never points to evidence in the record which supports the idea that 5 years will not provide sufficient time for her to establish gainful employment. As a result, Pamela has failed to carry her burden to show that limiting alimony to a period of 5 years was an abuse of the district court's discretion.

## VI. CONCLUSION

We conclude that the district court did not abuse its discretion in ordering Patrick to pay $1,224 per month in child support. Specifically, it was not an abuse of discretion to use a 3-year average to calculate Patrick's income for child support purposes. Moreover, the district court did not abuse its discretion when it excluded Patrick's income from 2004 in its income average. Although Patrick's additional child support obligations may eventually cause his income to drop below the poverty line of paragraph R, we cannot say that such obligations violate that provision at this juncture. Finally, it was not an abuse of discretion to disregard the youngest child's Social Security benefits when calculating Patrick's child support obligation.

With regard to the court's alimony award, the district court did not abuse its discretion when it limited Pamela's alimony

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[49] *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988).

[50] See *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002).

award to a period of 60 months. It appears, however, that it was a potential abuse of discretion to order Patrick to pay alimony which will drive his net income below the current basic subsistence limitation set forth in paragraph R of the NCSG. To resolve that potential, we remand the cause back to the trial court so that it may determine whether such an alimony award is specifically warranted by the evidence.

As a result, we reverse the district court's alimony award and remand the cause with directions to enter a monthly alimony award of $582.85 per month for 60 months unless the evidence warrants an upward deviation. On remand, the district court should also clarify (1) whether Patrick's actual share of day-care is 79.75 percent or 80.5 percent and (2) whether Patrick is accountable for the same proportion—79.75 percent—of the children's health care costs not covered by insurance and which exceed $480.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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NANCI A. MEISTER, APPELLEE, AND KEVIN V. SCHLENDER, APPELLANT, V. JOHN C. MEISTER, APPELLEE.

742 N.W.2d 746

Filed December 21, 2007. No. S-06-873.

1. **Attorneys' Liens.** Under Nebraska law, the proper method for enforcing an attorney's charging lien is by resort to equity, because such a lien is equitable in nature.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record; for questions of both fact and law, the appellate court determines the issues independently of the trial court's determination.
3. **Jurisdiction: Time: Notice: Appeal and Error.** To vest an appellate court with jurisdiction, a party must timely file a notice of appeal.
4. **Motions for New Trial: Time: Notice: Appeal and Error.** A motion for a new trial terminates the time in which a notice of appeal must be filed; a party has 30 days from the entry of an order denying the motion for a new trial to file a notice of appeal.
5. **Attorneys' Liens: Notice.** Nebraska law does not require an attorney to file notice of an attorney's lien before his or her discharge.
6. **Attorneys' Liens: Interventions.** The proper method of enforcing an attorney's lien in the original action is by intervention.

7. **Interventions.** To be filed as a matter of right, a petition in intervention under Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006) must be filed before the trial.
8. **Interventions: Equity.** Intervention under Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006) is a matter of right, but does not prevent a court of equity in the interests of justice from allowing a proper party to intervene after the trial has begun.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Reversed and remanded.

Kevin V. Schlender, pro se.

Bruce E. Stephens for appellee Nanci A. Meister.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Kevin V. Schlender appeals the district court's order that his attorney's lien was unenforceable under Neb. Rev. Stat. § 7-108 (Reissue 1997). Schlender represented Nanci A. Meister in her divorce from John C. Meister. After John appealed the court's divorce decree, Nanci discharged Schlender and hired new counsel. A month later, Schlender filed notice of his attorney's lien.

After the appeal, John paid money into the district court to satisfy the judgment against him, and the court held a hearing on Schlender's attorney's lien. Nanci objected to the lien because she had dismissed Schlender before he filed notice of the lien. The court determined that Schlender's lien was unenforceable. We reverse, because Schlender's failure to file his lien before his discharge did not affect the enforceability of the lien.

## BACKGROUND

The district court entered the Meisters' divorce decree on September 12, 2003. An amended decree awarded Nanci $38,153.42 as judgment to equalize the property division. Schlender withdrew from the case on November 7, and on December 15, he filed notice of his attorney's lien with the district court. He sent a copy of the notice to both Nanci and John. The notice provided that the lien was for $9,115.25, "which is the unpaid balance of compensation due from [Nanci] to [Schlender] for representation in the [divorce] action."

The Court of Appeals modified the judgment, reducing it to $32,348.94.[1] John satisfied the $32,348.94 judgment in part by paying $12,348.94 into the district court on April 21, 2006. On April 24, the court scheduled a May 1 hearing to address the attorney's lien. On April 27, Nanci filed an objection to the lien, arguing that she had dismissed Schlender and hired new counsel before Schlender filed his attorney's lien.

At the hearing, the court received an exhibit that included Schlender's affidavit and an attached statement for services. The statement showed that the amount owed was $9,115.25. The court took judicial notice of trial procedures in the underlying dissolution case, the exhibit list in that case, and the notice of the attorney's lien. Schlender argued that the attorney's lien statute did not require him to file the lien while he was representing Nanci. He asked the court to direct the clerk to pay him the balance due for his services.

On May 15, 2006, the court declared the attorney's lien "unenforceable under the lien statute." On May 23, Schlender moved to intervene "to determine the disposition of the settlement proceeds paid into the Court by [John] which are subject to the attorney's lien." The same day, Schlender also moved for new trial. After a hearing on July 10, the court overruled Schlender's motion for new trial. The court denied intervention on July 19. Schlender filed a notice of appeal on August 8.

## ASSIGNMENT OF ERROR

Schlender assigns, restated, that the court erred in deciding the attorney's lien was unenforceable under the lien statute.

## STANDARD OF REVIEW

[1,2] Under Nebraska law, the proper method for enforcing an attorney's charging lien is by resort to equity, because such a lien is equitable in nature.[2] On appeal from an equity action, we decide factual questions de novo on the record. For questions of

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[1] *Meister v. Meister*, No. A-03-1157, 2005 WL 625888 (Neb. App. Mar. 1, 2005) (not designated for permanent publication).

[2] *Kleager v. Schaneman*, 212 Neb. 333, 322 N.W.2d 659 (1982).

both fact and law, we determine the issues independently of the trial court's determination.[3]

## ANALYSIS

### JURISDICTIONAL QUESTION

[3,4] Nanci contends that Schlender did not timely file his appeal. To vest an appellate court with jurisdiction, a party must timely file a notice of appeal.[4] A party must file a notice of appeal within 30 days of the judgment, decree, or final order from which the party is appealing.[5] A motion for a new trial, however, terminates the time in which a notice of appeal must be filed.[6] And, if the court denies the motion, the party has 30 days from the entry of the order denying the motion to file a notice of appeal.[7]

The district court declared the attorney's lien unenforceable on May 15, 2006. Schlender moved for new trial on May 23, and the court overruled the motion on July 10. Schlender filed his notice of appeal on August 8. Nanci argues that because there was no trial regarding the attorney's lien, the motion for new trial was "spurious" and that therefore, the motion did not terminate the time for filing notice of appeal.[8]

"Trial" is defined as "a judicial examination of the issues, whether of law or of fact in an action."[9] The court's hearing on May 1, 2006, constituted a "trial" on the issue of Schlender's attorney's lien. The court received evidence, heard arguments by the parties, and, on May 15, resolved the issue by declaring the lien unenforceable. Because there was a trial, Schlender

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[3] See *County of Sarpy v. City of Gretna*, 273 Neb. 92, 727 N.W.2d 690 (2007).

[4] See *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003).

[5] Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

[6] § 25-1912(3).

[7] *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005).

[8] Brief for appellee Nanci Meister at 4.

[9] Neb. Rev. Stat. § 25-1103 (Reissue 1995).

properly moved for new trial within 10 days, terminating the time for filing a notice of appeal. Nanci's argument fails.

### SCHLENDER'S FAILURE TO FILE NOTICE OF THE LIEN BEFORE HIS DISCHARGE DID NOT AFFECT THE ENFORCEABILITY OF THE LIEN

Nebraska's attorney's lien statute, § 7-108, provides:

> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and *in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.*[10]

Before the hearing on Schlender's attorney's lien, Nanci objected to the lien because she dismissed Schlender before he filed his notice of the lien. Apparently based on Nanci's objection, the district court declared Schlender's lien unenforceable.

Schlender contends that the court erred in finding that his attorney's lien was unenforceable because he did not file it with the court before his discharge. He argues that the statute does not mandate that an attorney file the attorney's lien before discharge by his client. Nanci argues that Schlender's lien was unenforceable because he filed his notice of the lien after he had been discharged and because Nanci objected to the lien.

Nanci relies on *Gordon v. Hennings*.[11] In *Gordon*, an attorney represented a plaintiff in an action against a city. While in the course of his representation, the attorney acquired possession of warrants payable by the city to the plaintiff for $1,600. After obtaining possession of the warrants, the attorney asserted a lien for $1,400, which he claimed was for legal services rendered in the litigation. The plaintiff later discharged the attorney and specifically instructed him not to collect the warrants from the city. Nevertheless, the attorney proceeded to redeem the

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[10] § 7-108 (emphasis supplied).

[11] *Gordon v. Hennings*, 89 Neb. 252, 131 N.W. 228 (1911).

warrants and collected the money from the city treasurer. The *Gordon* court explained that the attorney's discharge

> did not dissolve the lien which the law gave [the attorney] upon the money in the city's possession, [or] destroy his equitable right to so much of the fund as might be necessary to satisfy that lien, but [the discharge] withdrew the attorney's authority to collect the money over his client's objection.[12]

[5] Contrary to Nanci's assertion, *Gordon* does not hold that once a client discharges an attorney, the attorney is no longer entitled to a lien absent his client's approval. Instead, the court expressly recognized that the attorney's discharge did not dissolve the lien or destroy his right to money that would satisfy the lien. The discharge simply withdrew his authority to collect on warrants that were drawn to the plaintiff's order. In other words, once the plaintiff discharged the attorney, the attorney no longer had authority to act on the plaintiff's behalf to "cash in" the warrants over the plaintiff's objections; however, he still had a right to the money satisfying the lien. The *Gordon* court did not hold that an attorney must file an attorney's lien before the attorney's discharge. The rule Nanci suggests would encourage improper discharge to avoid paying attorney fees. Therefore, Schlender's failure to file notice of the lien before his discharge did not affect the lien's enforceability. The court erred in declaring his lien unenforceable.

### Equity Excuses Schlender's Failure to Intervene Before the Hearing

Nanci contends that Schlender did not use the proper procedure for preserving the lien. She argues that to enforce his lien, Schlender had to file a petition to intervene. Nanci claims that by arguing his lien on May 1, 2006, and only later moving to intervene on May 23—after the court declared the lien unenforceable—Schlender put the "proverbial cart before the horse."[13]

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[12] *Id.* at 255, 131 N.W. at 229.

[13] Brief for appellee Nanci Meister at 5.

[6,7] The proper method of enforcing an attorney's lien in the original action is by intervention.[14] Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006) provides that a person who has an interest in the matter may intervene "before the trial commences." We have stated that to be filed as a matter of right, a petition in intervention under § 25-328 must be filed before the trial.[15] Here, the court held a hearing on the attorney's lien on May 1, 2006, and declared the lien unenforceable on May 15. Schlender did not move to intervene until May 23. Arguably, he did not follow the proper procedure to enforce his lien.

[8] Despite Schlender's failure to properly intervene before the hearing, this failure did not destroy any entitlement he may have had to the lien. We have stated that "'"[i]ntervention under [§ 25-328] is a matter of right, but does not prevent a court of equity in the interests of justice from allowing a proper party to intervene after the trial has begun. . . ." . . .'"[16] We further stated:

> '"'Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule. . . . 'Applications for leave to intervene after entry of a final decree are unusual, and generally have been denied. There are instances, however, where petitions for leave to intervene have been filed and granted after decree.' . . ." . . .'"[17]

As noted above, the proper method for enforcing an attorney's charging lien under Nebraska law is by resort to equity.[18] In the present case, equity requires a departure from the general rule that intervention cannot occur after entry of a final decree. Or, stated another way, equity requires a finding that Schlender

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[14] See, *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980); *Tuttle v. Wyman*, 149 Neb. 769, 32 N.W.2d 742 (1948).

[15] *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959).

[16] *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 27, 115 N.W.2d 796, 799 (1962) (quoting *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co.*, 126 Neb. 744, 254 N.W. 507 (1934)).

[17] *Id.* (citations omitted).

[18] See *Kleager v. Schaneman, supra* note 2.

could intervene after the hearing, and his failure to intervene before the hearing did not destroy any right he may have had to the lien.

Equity requires such a result because of the small window of time in which Schlender had to intervene before the hearing. John made his payment to the court on April 21, 2006, a Friday. The following Monday, April 24, the court ordered a show cause hearing for May 1. Recently, in *Stover v. County of Lancaster*,[19] we noted that once a judgment debtor paid funds to the court, the clerk should have notified the parties claiming an interest in the funds, and "intervention by [the attorney] at that point . . . would have been appropriate." Here, the court apparently gave Schlender notice of John's payment on April 24 when it ordered the hearing for May 1. This gave Schlender exactly 1 week—5 business days—to intervene before the hearing. Given this small window, equity permits Schlender to intervene after the court's disposition of the matter, which Schlender tried to do on May 23, 8 days after the court declared his lien unenforceable. Therefore, contrary to Nanci's argument, Schlender's failure to intervene before arguing his lien at the hearing did not destroy any entitlement he may have had to the lien.

## CONCLUSION

Schlender's filing of the lien after his discharge did not affect the enforceability of the lien. Therefore, the district court erred in declaring Schlender's lien unenforceable. And although intervention is the proper method of enforcing an attorney's lien in an original action, equity excuses Schlender's failure to intervene before the trial. On remand, we leave it to the district court to decide whether Schlender attached and perfected his lien. If so, the court should then determine the amount of the lien. We reverse, and remand.

REVERSED AND REMANDED.

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[19] *Stover v. County of Lancaster*, 271 Neb. 107, 115, 710 N.W.2d 84, 90 (2006).

# IN RE INTEREST OF DESTINY A. ET AL., CHILDREN UNDER 18 YEARS OF AGE.
# STATE OF NEBRASKA, APPELLEE, V.
# WENDY A., APPELLANT.

742 N.W.2d 758

Filed December 21, 2007. No. S-06-1380.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions.
3. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court reviews the issues independently of the lower court's findings.
4. **Statutes: Legislature: Intent.** For a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
5. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
6. **Parental Rights: Adoption.** When deciding whether to terminate parental rights, a court should not consider that an adoptive family has been identified.
7. **Parental Rights: Trial: Evidence: Appeal and Error.** The improper admission of evidence in a parental rights termination proceeding is not, in and of itself, reversible error; as long as the appellant properly objected at trial, the Supreme Court will not consider the evidence in a de novo review of the record.
8. **Parental Rights: Rules of Evidence: Due Process.** The Nebraska Evidence Rules do not apply in cases involving the termination of parental rights. Instead, due process controls and requires that the State use fundamentally fair procedures in an attempt to prove that a parent's rights to his or her child should be terminated.
9. ____: ____: ____. In determining whether admission or exclusion of particular evidence in a parental rights termination case would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost.
10. **Parental Rights: Evidence: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
11. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.
12. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Petition for further review from the Court of Appeals, IRWIN, CARLSON, and MOORE, Judges, on appeal thereto from the Separate

Juvenile Court of Douglas County, ELIZABETH G. CRNKOVICH, Judge. Judgment of Court of Appeals affirmed.

Thomas C. Riley, Douglas County Public Defender, and Mona L. Burton for appellant.

Eric Strovers, Deputy Douglas County Attorney, for appellee.

Thomas G. Incontro and Shawntal M. Smith, of Thomas G. Incontro, P.C., L.L.O., guardians ad litem.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

We granted Wendy A.'s petition for further review of a Nebraska Court of Appeals' memorandum opinion and judgment on appeal filed on May 24, 2007. The Court of Appeals affirmed the separate juvenile court's decision terminating Wendy's parental rights to her three children under Neb. Rev. Stat. § 43-292 (Reissue 2004). We granted Wendy's petition to clarify an inconsistency between case law and Neb. Rev. Stat. § 43-292.02(2) (Reissue 2004). That statute states that a court deciding whether to terminate parental rights should not consider that an adoptive family has been identified. We conclude that under § 43-292.02(2), a juvenile court, in terminating parental rights, cannot consider whether an adoptive family has been identified. Although the juvenile court erroneously considered the foster parents' willingness to adopt, we disregard that evidence in our de novo review. We conclude the guardian ad litem presented other clear and convincing evidence that terminating Wendy's parental rights is in the children's best interests. We affirm.

## BACKGROUND

Wendy is the natural mother of the following minor children: Vincent R., Jr., born July 6, 1998; Destiny A., born March 19, 2002; and Antonio A., born January 21, 2003. The court removed all three children from Wendy's care and placed

them in the custody of the Nebraska Department of Health and Human Services (DHHS).

The day after Destiny's birth, the court placed her in DHHS' custody. An affidavit attached to the motion for temporary custody stated Wendy tested positive for drugs at Destiny's delivery and had admitted to using marijuana weekly during her pregnancy. Destiny has remained in out-of-home placement since the day of her birth. About 3 weeks later, on April 10, 2002, the court determined that she was a child in need of special supervision.

On January 8, 2003, the State moved for temporary custody of Vincent. An affidavit stated that Wendy had admitted to using methamphetamine and marijuana while pregnant with Destiny; she had admitted to using marijuana since Destiny's removal; she had not complied with the court's orders relating to Destiny's case; she had tested positive for methamphetamine on two separate occasions since Destiny's removal; and she continued to use illegal drugs even though she was 7 months pregnant. The court issued an order for immediate custody. Vincent has remained in out-of-home placement since then.

Antonio has been in out-of-home custody since January 22, 2003, the day after his birth. An affidavit attached to the motion for temporary custody stated that Wendy's maternal drug screen tested positive for amphetamines, barbiturates, cocaine, and cannabinoids. On April 17, the court determined that Antonio and Vincent were children in need of special supervision.

### Wendy's Parental Rights Are Terminated

In November 2004, the State moved to terminate Wendy's parental rights. In May 2005, however, the State moved to dismiss the motion for termination. The court granted the motion to dismiss and dismissed the State's motion with prejudice.

However, in May 2006, the children's guardian ad litem moved to terminate Wendy's parental rights. The guardian ad litem alleged that the court should terminate Wendy's parental rights under § 43-292(2), (3), (6), and (7), and that it was in the children's best interests.

The guardian ad litem called each child's current foster mother to testify. Destiny's foster mother testified, over Wendy's objection, that Destiny usually stated she did not want to attend scheduled visits with Wendy. The court also overruled Wendy's objection when Destiny's foster mother testified that if Destiny became free for adoption, she would be willing to provide care and support for her. The court also allowed Antonio's foster mother to testify that Antonio tells her he does not want to go on visits with Wendy. Wendy also objected when Antonio's foster mother testified that she and her husband would be willing to provide Antonio a loving home if he became available for adoption. The court overruled Wendy's objection.

The director of Destiny and Antonio's daycare testified that she sometimes observed Destiny right before a visitation with Wendy and that Destiny was usually withdrawn. Destiny would cling to the daycare personnel and say she did not want to go on the visit. The daycare director stated this was the same for Antonio. The case manager testified that when she observed visits between Wendy and the children, she noticed Destiny and Antonio did not seem excited to be there.

Other testimony showed Wendy had generally complied with the case plan and continued to make progress. Witnesses reported that during visits with the children, Wendy was affectionate and nurturing. The family's case manager from June 2004 through February 2006 testified that Wendy had submitted to random urinalysis screenings, which were negative. She further stated she had no concerns that Wendy was using drugs or alcohol during that time.

But evidence established that Wendy's April 26, 2006, urinalysis was positive for methamphetamine. After the positive test, a case manager sent Wendy two letters, the first requesting she complete a urinalysis on May 25, and the second requesting two more urinalysis screenings in June. Wendy did not comply with these requests.

Evidence also showed Wendy missed individual therapy sessions at about the same time. She attended six sessions from March to May 2006, but she missed the next six sessions. Although she gave the therapist reasons for missing three of the sessions, the other three missed sessions were "no-shows."

On November 6, 2006, the juvenile court terminated Wendy's parental rights. The court found by clear and convincing evidence that grounds existed under § 43-292(2), (3), (6), and (7) for termination. The court also decided that termination was in the children's best interests and denied Wendy's motion for continued visitation.

## Court of Appeals' Decision

Wendy appealed the juvenile court's decision to the Court of Appeals. Wendy assigned 13 errors. Wendy made the following claims: (1) the court erred in overruling her relevance objections to testimony that the foster parents were willing to adopt Destiny and Antonio, (2) the court erred in overruling her objections to the foster mothers' testimony that the children did not want to attend visits with Wendy, and (3) the court erred in finding that terminating Wendy's parental rights was in the best interests of the children.

Wendy claimed that under § 43-292.02, testimony that foster parents are willing to adopt the child should have no bearing in a termination of parental rights hearing. The Court of Appeals decided the lower court did not err in overruling Wendy's objections to the foster parents' testimony. The Court of Appeals concluded that "[s]uch evidence is necessary to show that termination of a parent's rights is in the children's best interests, specifically that the children would be provided with more permanency than they would have otherwise."

Wendy also argued the court violated her due process rights when it overruled her hearsay objections and allowed the foster mothers to testify that Destiny and Antonio stated they did not want to go on visits. The Court of Appeals noted that Wendy's counsel cross-examined both foster mothers and that other evidence showed the children's reactions to visitation. The court concluded the totality of the record showed Wendy was afforded due process regarding the testimony about the children's statements.

Finally, Wendy argued that termination was not in the children's best interests because Wendy and the children had a "positive relationship" and because she complied with the

rehabilitation plan.[1] Wendy claimed that she had made "great strides in turning her life around, remaining drug free and placing herself in a position to parent her children."[2] The Court of Appeals concluded that the lower court did not err in finding that the termination of Wendy's parental rights was in the children's best interests. The Court of Appeals relied on evidence that the children had not returned to Wendy's care since their removal; that Wendy tested positive for drugs in April 2006; that her visitation and therapy attendance became more sporadic around that time; that the children have been in stable, loving foster homes; and that two of the children will likely be adopted by their foster families.

The Court of Appeals concluded there existed clear and convincing evidence to support a finding that Wendy's parental rights should be terminated under § 43-292(7) and that termination was in the children's best interests. The court affirmed the order terminating Wendy's parental rights. We granted Wendy's petition for further review.

## ASSIGNMENTS OF ERROR

Wendy assigns, restated, that the Court of Appeals erred in (1) deciding the juvenile court properly allowed the foster mothers' testimony regarding their willingness to adopt the children, (2) determining that Wendy's due process rights were sufficiently protected even though the foster mothers were allowed to testify about the children's statements regarding visitation, and (3) deciding that the termination of Wendy's parental rights is in the children's best interests.

## STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law.[3] When we review questions of law, we resolve the questions independently of the lower court's conclusions.[4]

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[1] Brief for appellant at 40.

[2] *Id.* at 42.

[3] *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006).

[4] See *id.*

[3] Juvenile cases are reviewed de novo on the record, and we review the issues independently of the lower court's findings.[5]

## ANALYSIS

### THE COURT OF APPEALS ERRED IN DECIDING THAT TESTIMONY REGARDING THE FOSTER PARENTS' WILLINGNESS TO ADOPT THE CHILDREN WAS ADMISSIBLE

Section 43-292.02(2) provides, in part, "The fact that a qualified family for an adoption of the juvenile has been identified, recruited, processed, and approved shall have no bearing on whether parental rights shall be terminated." Wendy argued to the Court of Appeals that under § 43-292.02(2), the juvenile court erred in allowing the foster mothers to testify that they were willing to adopt the children.

[4,5] In interpreting § 43-292.02, we look to the statute's legislative history. For a court to inquire into a statute's legislative history, the statute in question must be open to construction. A statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.[6] A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.[7]

The relevant provision in § 43-292.02(2) is ambiguous. Section 43-292.02 addresses the State's duty to file a petition to terminate parental rights. Subsection (1) identifies cases in which the State has a duty to file a petition. Subsection (2) provides:

> A petition shall not be filed on behalf of the state to terminate the parental rights of the juvenile's parents or, if such a petition has been filed by another party, the state shall not join as a party to the petition if the sole factual basis for the petition is that (a) the parent or parents of the juvenile are financially unable to provide health care for the juvenile or (b) the parent or parents of the juvenile are incarcerated. The fact that a qualified family for

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[5] *See In re Interest of Xavier H., ante* p. 331, 740 N.W.2d 13 (2007).

[6] *Zach v. Eacker, supra* note 3.

[7] *Id.*

> an adoption of the juvenile has been identified, recruited, processed, and approved shall have no bearing on whether parental rights shall be terminated.

The inclusion of the second sentence in subsection (2) creates an ambiguity. When considering the statute as a whole, it is unclear whether the relevant language applies only in those cases identified in the first sentence of subsection (2), or whether it applies in all parental rights termination cases. Here, the petition's factual basis is not one of those identified in subsection (2). Thus, the relevant language is inapplicable if it applies only in cases falling within subsection (2). Because the provision is ambiguous, the statute is open to construction.

The Legislature enacted § 43-292.02 through 1998 Neb. Laws, L.B. 1041. The legislative history for L.B. 1041 suggests the relevant provision appears in subsection (2) because all the provisions now appearing in subsection (2) were added by a single amendment to the bill.[8] We do not believe the provision's application is limited to those cases in subsection (2). The amendment's introducer explained the purpose of the provision:

> And then the third matter that's covered by this amendment is that the fact that an adoptive family has been identified or recruited should not be a fact considered by the court in determining whether parental rights are terminated. And that really is clear to any judge, I think, that you . . . the court has to make a determination on parental rights based upon the facts of that case, not whether somebody is willing to adopt the child or not. That's the second step. First you deal with the criteria of law in determining whether parental rights should be terminated. After that has been treated, if parental rights are terminated, then you go to the next step and you proceed with the adoption.[9]

This explanation does not limit the provision's application to only those cases appearing in the first sentence of subsection (2). Instead, the provision applies in all parental rights termination cases, including the one currently before us.

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[8] Floor Debate, 95th Leg., 2d Sess. 13122 (Mar. 10, 1998).

[9] *Id.* at 13122-23.

[6,7] Section 43-292.02(2) expressly provides that when deciding whether to terminate parental rights, a court should not consider that an adoptive family has been identified. The Court of Appeals erroneously decided the juvenile court did not err in allowing the foster mothers to testify about their willingness to adopt the children. The Court of Appeals further erred in considering this evidence when it decided that terminating Wendy's parental rights was in the best interests of the children. The court's error, however, is not a reversible error because Wendy properly objected at trial, and we will not consider this testimony in our de novo review of the best interests issue.[10]

In the recent case of *In re Interest of Phoenix L.*,[11] although the appellant did not raise the issue, in determining that termination of parental rights was in the children's best interests, we noted that the children's foster family wished to adopt the children. To the extent we relied on this evidence, we disapprove of that language.

### The Court of Appeals Did Not Err in Deciding Wendy's Due Process Rights Were Sufficiently Protected

The juvenile court allowed Destiny's and Antonio's foster mothers to testify that the children had stated they did not want to go on visits with Wendy. Wendy contends that the Court of Appeals erred in determining that her due process rights were sufficiently protected when the juvenile court allowed this testimony. She argues the statements were hearsay. The Court of Appeals decided, based on the totality of the record, that Wendy was afforded due process regarding the receipt of the foster mothers' testimony. The court noted that Wendy's counsel cross-examined both foster mothers. The court also noted that other witnesses provided evidence of the children's reactions to visitation and that Wendy did not assign as error their testimony.

[8,9] The Nebraska Evidence Rules do not apply in cases involving the termination of parental rights.[12] Instead, due

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[10] See *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990).

[11] *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006).

[12] *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003).

process controls and requires that the State use fundamentally fair procedures before a court terminates parental rights.[13] In determining whether admission or exclusion of particular evidence would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost.[14]

But even if we were to determine that the foster mothers' testimony was inadmissible hearsay, any error on the part of the juvenile court was harmless.[15] The director for Destiny and Antonio's daycare and the family's DHHS case manager both testified about Destiny's and Antonio's reactions to visitation. Wendy did not assign as error the admission of their testimony. As we stated in *In re Interest of Gloria F.*,[16] "'[A]ny error in receiving the [testimony] was not fatal to the juvenile court's determination [because] [t]he court had before it other evidence, in the form of testimony and exhibits . . . sufficient to sustain the order of termination.'" Even if the court had excluded the foster mothers' testimony, the court still would have been aware of the children's reactions to visitation. Therefore, we need not determine whether the testimony was inadmissible. The Court of Appeals did not err in deciding Wendy's due process rights were sufficiently protected.

### The Court of Appeals Did Not Err in Determining That the Termination of Wendy's Parental Rights Was in the Children's Best Interests

Wendy contends the Court of Appeals erred in deciding that terminating her parental rights was in the children's best interests. Wendy argues that "[t]ermination of parental rights is only appropriate as a last resort, not simply because there appears to be a more attractive alternative for the children or because the court reasonably believes that some other person could

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[13] *Id.*

[14] See, *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999); *In re Interest of Floyd B.*, 254 Neb. 443, 577 N.W.2d 535 (1998).

[15] See *In re Interest of Gloria F.*, 254 Neb. 531, 577 N.W.2d 296 (1998).

[16] *Id.* at 538, 577 N.W.2d at 302 (quoting *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987), *overruled on other grounds, In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987)).

better provide for the child."[17] Wendy asserts that the Court of Appeals incorrectly relied on the relationship between the children and their foster parents as a reason to affirm the juvenile court's decision. She claims that she and the children have a "positive relationship" and that she has complied with the plan of rehabilitation.

[10,11] Before parental rights may be terminated, the evidence must clearly and convincingly establish one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.[18] We have held that where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.[19] The State removed the children from Wendy's care because of her illegal drug use. Therefore, her testing positive for methamphetamine in April 2006 is particularly worrisome. Also, we cannot ignore that a case manager sent Wendy letters requesting she complete three additional drug tests after the April test, but Wendy failed to comply with the requests. About the same time, Wendy missed three therapy sessions without giving a reason for her absences.

[12] Wendy correctly asserts that termination of parental rights should be a last resort.[20] Yet, the system has run out of options. It has extended a helping hand. But by testing positive for methamphetamine in April 2006, missing three subsequent drug tests, and failing to appear for her therapy sessions, she has shown that she is unwilling or unable to rehabilitate herself. When the court terminated Wendy's parental rights, Vincent had been in foster care for 3 years. Destiny and Antonio had spent their entire lives, 4 years and 3 years, in foster care. The system cannot and should not allow children to languish in

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[17] Memorandum brief for appellant in support of petition for further review at 6.

[18] See *In re Interest of Xavier H., supra* note 5.

[19] *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

[20] See *In re Interest of Xavier H., supra* note 5.

foster care waiting to see if the parent will mature.[21] After a de novo review of the record, we conclude there exists clear and convincing evidence that terminating Wendy's parental rights is in the children's best interests. The Court of Appeals did not err in affirming the lower court's decision.

## CONCLUSION

The Court of Appeals erroneously decided the juvenile court did not err in allowing the foster parents to testify about their willingness to adopt the children. Section 43-292.02(2) provides that such evidence shall have no bearing on whether a court should terminate parental rights. But the Court of Appeals' error is not a reversible error because we did not consider this testimony in our de novo review of the best interests issue.

The Court of Appeals did not err in deciding Wendy's due process rights were sufficiently protected when the juvenile court allowed the foster mothers to testify about the children's statements regarding visitation. Any error by the juvenile court in admitting the testimony was harmless error.

The Court of Appeals did not err in determining that the termination of Wendy's parental rights is in the children's best interests. Given that Wendy tested positive for methamphetamine in April 2006 and other evidence on the record, we conclude there exits clear and convincing evidence that terminating Wendy's parental rights is in the best interests of the children. We affirm.

AFFIRMED.

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[21] *In re Interest of DeWayne G. & Devon G.*, *supra* note 19.

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STATE OF NEBRASKA, APPELLEE, V.
REGINA A. JACKSON, APPELLANT.
742 N.W.2d 751

Filed December 21, 2007. No. S-07-084.

1. **Double Jeopardy: Pleadings: Final Orders: Appeal and Error.** The overruling of a plea in bar raising a double jeopardy claim is a final order from which an appeal may be taken.

2. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Constitutional Law: Double Jeopardy.** The Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
5. ____: ____. The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
6. **Double Jeopardy: Juries: Pleas.** Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.
7. **Constitutional Law: Double Jeopardy.** The constitutional protection against double jeopardy does not mean that every time a defendant is put to trial before a competent tribunal, he or she is entitled to go free if the trial fails to end in a final judgment.
8. **Constitutional Law: Double Jeopardy: Final Orders: New Trial.** Where jeopardy has attached in a prior criminal proceeding which does not result in final judgment and the State subsequently seeks to retry the defendant on the same charge, the constitutional protection against double jeopardy bars the retrial only if the prior proceeding terminated jeopardy.
9. **Double Jeopardy: Motions for Mistrial.** A mistrial does not automatically terminate jeopardy, because a trial can be discontinued when particular circumstances manifest a necessity for doing so, and when failure to discontinue would defeat the ends of justice.
10. ____: ____. Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant.

Appeal from the District Court for Douglas County, GARY B. RANDALL, Judge, on appeal thereto from the County Court for Douglas County, JEFFREY MARCUZZO, Judge. Judgment of District Court reversed, and cause remanded with directions.

Thomas C. Riley, Douglas County Public Defender, and Mark A. Mendenhall for appellant.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

The question presented in this appeal is whether a mistrial resulting from the recusal of the trial judge during a bench trial bars retrial under the double jeopardy provisions of the state and federal Constitutions. The issue turns on whether the record reflects a "manifest necessity" for terminating the trial. We conclude that it does not.

## BACKGROUND

Regina A. Jackson was charged in the county court for Douglas County with assault and battery, disorderly conduct, and driving under the influence, all misdemeanor offenses defined by the Omaha Municipal Code. She entered pleas of not guilty to each charge, and the case was scheduled for trial.

At the beginning of the bench trial, immediately after both counsel had entered their appearances, the trial judge stated: "Before we go any further on this I want everybody here to know that I've seen [Jackson] working in the clerk's office. I don't know her in anyway [sic]. I mean I just see her and say hi. You want me to recuse myself?" Jackson responded in the negative, and neither counsel requested recusal. The prosecutor indicated that she was willing to proceed.

The first witness was the victim of the alleged assault. After her testimony was concluded, the judge asked to see counsel in chambers, where he stated:

> The more I think about this case the more I feel it would be appropriate to appoint . . . an outside judge. I mean I should recuse myself from hearing any further evidence in this matter. We are going to check with the presiding judge and see when we could get an outside judge to come in and hear this case and we will schedule it. We will let you know this afternoon.

Later the same day, counsel and Jackson appeared before the judge, who noted for the record that he had recused himself "in the middle of the trial" and that he would enter a mistrial on his own motion. The prosecutor responded, "Manifest necessity," and the judge said, "Manifest necessity and continue this matter until this afternoon and declare a mistrial." At that point, Jackson's counsel objected, noting that a witness had testified

and jeopardy had attached and that Jackson was present and prepared to proceed. The judge noted the objection, but stated, "Due to manifest necessity this matter is declared a mistrial." The court entered a written order to this effect on the same day, and the trial was rescheduled.

Jackson subsequently filed a plea in bar, asserting that retrial would violate her constitutional right not to be subjected to double jeopardy. The plea in bar was denied, and Jackson appealed to the district court for Douglas County, which affirmed the judgment of the county court. Jackson perfected this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

## ASSIGNMENT OF ERROR

Jackson assigns that the district court erred in affirming the denial of her plea in bar.

## STANDARD OF REVIEW

[1-3] The overruling of a plea in bar raising a double jeopardy claim is a final order from which an appeal may be taken.[2] Issues regarding the grant or denial of a plea in bar are questions of law.[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[4]

## ANALYSIS

[4-8] The Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.[5] The protection

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

[2] See, *State v. Woodfork*, 239 Neb. 720, 478 N.W.2d 248 (1991), *overruled on other grounds, State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993); *State v. Smith*, 3 Neb. App. 564, 529 N.W.2d 116 (1995).

[3] *State v. Humbert*, 272 Neb. 428, 722 N.W.2d 71 (2006).

[4] *Id.*

[5] See, *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005); *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001).

provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.[6] Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.[7] However, the constitutional protection against double jeopardy does not mean that every time a defendant is put to trial before a competent tribunal, he is entitled to go free if the trial fails to end in a final judgment.[8] Where jeopardy has attached in a prior criminal proceeding which does not result in final judgment and the State subsequently seeks to retry the defendant on the same charge, the constitutional protection against double jeopardy bars the retrial only if the prior proceeding terminated jeopardy.[9]

[9,10] In this case, jeopardy attached when the court heard testimony. The mistrial declared on the court's own motion over Jackson's objection prevented a final judgment. However, a mistrial does not automatically terminate jeopardy, because "a trial can be discontinued when particular circumstances manifest a necessity for doing so, and when failure to discontinue would defeat the ends of justice."[10] Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant.[11]

The U.S. Supreme Court has held that while "[t]he words 'manifest necessity' appropriately characterize the magnitude of the prosecutor's burden[,] . . . those words do not describe a standard that can be applied mechanically or without attention

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[6] *State v. Marshall, supra* note 5; *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003); *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001).

[7] *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[8] *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949); *State v. Marshall, supra* note 5; *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

[9] *State v. Marshall, supra* note 5. See *State v. Bostwick, supra* note 8.

[10] *Wade v. Hunter, supra* note 8, 336 U.S. at 690.

[11] *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); *State v. Marshall, supra* note 5.

to the particular problem confronting the trial judge."[12] The Court has also recognized that "there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate."[13] The Court noted that "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused."[14] Conversely, "[a]t the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial."[15] In order to protect the interest of a criminal defendant in not being subjected to double jeopardy, "reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial."[16]

This court has held that manifest necessity for a mistrial was established in cases where the potential bias of a juror is discovered during trial.[17] However, we have not previously addressed the question of whether manifest necessity for a mistrial is established by the recusal of a judge during a bench trial. Some courts have held that a mistrial was manifestly necessary when a judge declared an inability to disregard evidence which had been ruled inadmissible in the bench trial.[18] Manifest necessity for a mistrial has also been found where the judge conducting a bench trial recognizes and admits having a bias which would affect his or her objectivity.[19] As one court noted: "When judges doubt their own ability to adjudicate impartially, they should

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[12] *Arizona v. Washington*, *supra* note 11, 434 U.S. at 505-06.

[13] *Id.*, 434 U.S. at 506

[14] *Id.*, 434 U.S. at 508.

[15] *Id.*, 434 U.S. at 509.

[16] *Id.*, 434 U.S. at 514.

[17] *State v. Marshall*, *supra* note 5; *State v. Clifford*, 204 Neb. 41, 281 N.W.2d 223 (1979).

[18] *Com. v. Morris*, 773 A.2d 192 (Pa. Super. 2001); *Bailey v. State*, 219 Ga. App. 258, 465 S.E.2d 284 (1995).

[19] *Com. v. Leister*, 712 A.2d 332 (Pa. Super. 1998); *Com. v. Smith*, 321 Pa. Super. 51, 467 A.2d 888 (1983).

recuse themselves. . . . Such an inability to be objective creates a manifest necessity for the declaration of a mistrial, particularly when a judge must exert the broad discretion that a bench trial demands."[20] Another court held that manifest necessity exists for a mistrial where, during a bench trial, "the judge correctly decides he must recuse himself, and there is no evidence of bad faith conduct by the judge."[21]

In *Arizona v. Washington*,[22] the Court held that a specific finding of "manifest necessity" is not necessary to prevent termination of jeopardy if the record provides sufficient justification for the mistrial ruling. By the same reasoning, a specific finding of "manifest necessity" by the trial judge will not prevent termination of jeopardy unless the facts and circumstances upon which the finding is based are apparent from the record.

The record in this case is insufficient for us to determine whether or not the mistrial was justified by manifest necessity. Although the trial judge did not refer to any specific provision of the Nebraska Code of Judicial Conduct as the basis for his recusal, canon 3 of the code governs judicial disqualification. It provides that a judge "shall not participate in any proceeding in which the judge's impartiality reasonably might be questioned, *including but not limited to* instances where . . . [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding."[23] In this case, the trial judge did not specifically state that he had formed a personal bias or prejudice, or that he had knowledge of any disputed evidentiary facts concerning the proceeding. The judge stated only that he had "seen [Jackson] working in the clerk's office" and that he had greeted her by saying "hi." The record does not disclose when or how frequently this occurred. It is not clear from the record whether Jackson was a court employee; the county judge who heard the plea in bar noted that he knew her as "an employee

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[20] *Com. v. Leister, supra* note 19, 712 A.2d at 335 (citations omitted).

[21] *State v. Graham*, 91 Wash. App. 663, 665, 960 P.2d 457, 458 (1998).

[22] *Arizona v. Washington, supra* note 11.

[23] Neb. Code of Jud. Cond., Canon 3E(1) (rev. 2000) (emphasis supplied).

of the Douglas county clerk's office." The trial judge did not explain why, after making his initial disclosure and beginning the trial with the consent of both parties, he concluded that "it would be appropriate to appoint . . . an outside judge" to hear the case. Without a more complete factual record, we cannot make a determination of whether the trial judge's impartiality might be questioned on the basis of his personal acquaintance with Jackson prior to the trial.

We have no reason to doubt that the trial judge gave careful consideration to his decision to recuse himself and declare a mistrial. The difficulty lies in the fact that we cannot determine whether he exercised sound discretion in doing so because of the inadequacy of the record as to the underlying reasons for the decision. Because of the constitutional implications, the State bears the burden of demonstrating the manifest necessity of a mistrial declared over the objection of the defendant in a criminal case.[24] The State cannot meet this burden by simply requesting the court to make a general finding of manifest necessity, as it did here, without a factual record to support the finding. Where the reason for a mistrial is not clear from the record, the uncertainty with respect to manifest necessity must be resolved in favor of the defendant.[25]

## CONCLUSION

For these reasons, we conclude that the State did not meet its burden of demonstrating the manifest necessity of the mistrial and that therefore, the declaration of the mistrial terminated jeopardy. Retrial would violate Jackson's constitutional right not to be placed twice in jeopardy, and, accordingly, her plea in bar should have been sustained. We therefore reverse the judgment of the district court and remand the cause to that court with directions to reverse the order of the county court's overruling Jackson's plea in bar and remand the matter to the county court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

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[24] *Arizona v. Washington, supra* note 11.

[25] See, *West Valley City v. Patten*, 981 P.2d 420 (Utah App. 1999); *Allen v. State*, 656 S.W.2d 592 (Tex. App. 1983).

# ROBERT LOWE, APPELLEE, V. DRIVERS MANAGEMENT, INC., APPELLANT.

743 N.W.2d 82

Filed December 21, 2007. No. S-07-428.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
3. ____: ____. On appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation.** Neb. Rev. Stat. § 48-162.01(7) (Cum. Supp. 2006) establishes a two-part test to determine whether benefits should be suspended, reduced, or limited. First, the employee must either refuse to undertake or fail to cooperate with a court-ordered physical, medical, or vocational rehabilitation program. Second, the employee's refusal must be without reasonable cause.
6. **Workers' Compensation: Evidence.** Both parts of the two-part test in Neb. Rev. Stat. § 48-162.01(7) (Cum. Supp. 2006) present factual questions to be determined by the trial judge based upon the evidence.
7. **Workers' Compensation: Proof.** To obtain a modification of a prior award, the applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made.
8. **Workers' Compensation: Evidence: Appeal and Error.** When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.
9. **Workers' Compensation: Expert Witnesses.** The Workers' Compensation Court trial judge is entitled to accept the opinion of one expert over another.
10. **Workers' Compensation: Proof.** Under the provisions of Neb. Rev. Stat. § 48-162.01(7) (Cum. Supp. 2006), the employer bears the burden of proof to demonstrate that an injured employee has refused to undertake or failed to cooperate with a physical, medical, or vocational rehabilitation program and that such refusal or failure is without reasonable cause such that the compensation court or judge may properly rely on such evidence to suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act.

Appeal from the Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Daniel R. Fridrich, of Werner Enterprises, Inc., for appellant.

Timothy S. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

## NATURE OF CASE

In 2004, appellee Robert Lowe received a workers' compensation award that included permanent partial disability and vocational rehabilitation benefits as a result of an injury he sustained while employed by appellant Drivers Management, Inc. (DMI). The present appeal involves an application filed by Lowe in 2005 to modify that initial award. Following a hearing, the trial judge of the Nebraska Workers' Compensation Court sustained Lowe's application. The trial judge determined that Lowe was permanently and totally disabled and awarded Lowe permanent total disability benefits. However, pursuant to Neb. Rev. Stat. § 48-162.01(7) (Cum. Supp. 2006), the judge ordered that Lowe's disability benefits be reduced for a period of time prior to the modification proceedings due to Lowe's failure to participate in vocational rehabilitation services.

Both DMI and Lowe appealed to the Nebraska Workers' Compensation Court three-judge review panel. The review panel affirmed that part of the trial judge's order that determined Lowe was entitled to permanent total disability benefits but reversed that portion of the order that had reduced Lowe's benefits for failing to participate in vocational rehabilitation services. DMI appeals. Because there was competent evidence to support the reduction, we reverse that portion of the review panel's order that reversed the trial judge's order reducing Lowe's workers' compensation benefits pursuant to § 48-162.01(7). In all other respects, the review panel's order is affirmed.

## STATEMENT OF FACTS

In 2001, Lowe sustained an injury arising out of and in the course of his employment with DMI. The injury resulted in neck and radicular arm pain. Lowe filed a petition with the Nebraska Workers' Compensation Court. In an order filed February 11, 2004, he was awarded workers' compensation disability benefits (the initial award). The initial award provided that Lowe receive permanent partial disability benefits based upon a 70-percent loss of earning capacity. The court also approved a vocational rehabilitation plan calling for job placement services. Specifically, the court determined that a vocational rehabilitation plan had "been approved by a vocational rehabilitation specialist, and so [Lowe] should participate in this plan."

It is undisputed that Lowe failed to participate in the plan. The record reflects that the vocational rehabilitation counselor who was to assist Lowe with job placement services "left several [telephone] messages for [Lowe] and sent him a letter dated 3/12/04 asking him to contact [her] but [she] never heard back from him." After the counselor failed to receive a response from Lowe, she "submitted a case closure report form to the Nebraska Workers' Compensation Court dated 4/20/04 with the status of 'Closed Not Working—Not Interested in VR Services.'"

In July 2004, as a result of "gradually increasing pain in his neck, left shoulder, and left arm," Lowe began treating with Dr. Gerard H. Dericks. On October 4, 2005, Lowe filed an application to modify the initial award, claiming that he was totally disabled. On April 14, 2006, a modification hearing was held before a trial judge of the workers' compensation court on Lowe's application. A total of 66 exhibits were received into evidence, including Dericks' medical reports and deposition. Lowe appeared and testified during the hearing.

On August 22, 2006, the trial judge entered his "Further Award." The judge found that Lowe had failed to participate in court-ordered vocational rehabilitation services and that he did not have reasonable cause for failing to participate in those services during a period immediately after those services had been awarded. As a result, pursuant to § 48-162.01(7), the judge ordered a partial reduction in the amount of the disability

benefits awarded to Lowe prior to the modification proceedings. In his further award, the trial judge also determined that there had been a material and substantial change in Lowe's condition, necessitating a reassessment of Lowe's loss of earning capacity. The judge determined that Lowe was permanently and totally disabled and awarded Lowe disability benefits based upon his permanent and total disability. With respect to Lowe's failure to participate in vocational rehabilitation, the judge did not reduce compensation for Lowe's permanent and total disability going forward, stating "there is reasonable cause not to participate [in vocational rehabilitation] because [Lowe] is totally disabled." For the sake of completeness, we are aware of certain internal inconsistencies in the reasoning of the trial judge's opinion, but the existence of these matters is not relevant to the resolution of the legal issues presented in this appeal.

DMI filed for review of the trial judge's further award before the workers' compensation review panel. Lowe also filed for review of that portion of the trial judge's further award that reduced his benefits for failure to participate in the vocational rehabilitation plan. A hearing was held before the review panel on February 6, 2007, and on March 16, the review panel entered its "Order of Affirmance in Part on Review and Reversal in Part on Review." The review panel determined that the trial judge was not clearly wrong when he found that Lowe was permanently and totally disabled, and therefore, it affirmed that portion of the trial judge's further award. However, the review panel determined that the trial judge erred in reducing Lowe's workers' compensation benefits pursuant to § 48-162.01(7), and it reversed that part of the trial judge's further award. DMI appeals.

## ASSIGNMENTS OF ERROR

On appeal, DMI assigns numerous errors that can be restated as two. DMI claims that the Workers' Compensation Court review panel erred (1) in reversing that portion of the trial judge's further award that reduced the amount of disability benefits owed to Lowe due to his failure to participate in vocational rehabilitation services immediately after those services had been awarded and (2) in affirming the trial judge's further

award that modified Lowe's initial award and that determined Lowe was permanently totally disabled.

## STANDARDS OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

[2-4] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Id.* On appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000).

## ANALYSIS

As its first assignment of error, DMI claims that the review panel erred when it reversed that portion of the trial judge's further award that had reduced the amount of disability benefits owed to Lowe due to his failure to participate in vocational rehabilitation. The statute at issue with respect to this claim is § 48-162.01(7), which currently provides, in pertinent part, as follows:

> If the injured employee without reasonable cause refuses to undertake or fails to cooperate with a physical, medical, or vocational rehabilitation program determined by the compensation court or judge thereof to be suitable for him or her . . . the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act.

DMI asserts that this statute establishes a two-part test to determine whether benefits should be suspended, reduced, or limited. First, the employee must either refuse to undertake or fail to cooperate with a court-ordered physical, medical, or vocational rehabilitation program. Second, the employee's refusal must be without reasonable cause.

[5,6] We agree with DMI's assertion that § 48-162.01(7) establishes a two-part test. We further note that it has been held that both parts of this two-part test present factual questions to be determined by the trial judge based upon the evidence. See *Warburton v. M & D Construction Co.*, 1 Neb. App. 498, 498 N.W.2d 611 (1993).

In his decision, the trial judge found that Lowe did not participate in the job placement services he was ordered to participate in under the initial award, a fact that neither party disputes. Further, as we read his order, the trial judge found that during the period from the initial award up to the modification proceedings, Lowe's failure to participate in vocational rehabilitation was without reasonable cause. The record contains evidence supporting this finding of fact. Specifically, the record contains evidence to the effect that immediately following the entry of the February 11, 2004, initial award, Lowe failed to respond to the vocational rehabilitation counselor's efforts to contact him with regard to these services, thereby causing her to submit a case closure report form dated April 20, 2004, to the Nebraska Workers' Compensation Court with the status of "Closed Not Working—Not Interested in VR Services." Thus, the record indicates that Lowe took no steps to participate in vocational rehabilitation despite an award and efforts to provide services.

In determining whether to affirm, modify, reverse, or set aside a judgment of the workers' compensation court review panel, a higher appellate court reviews the findings of the trial judge who conducted the hearing. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* The record contains evidence supporting the trial judge's findings of fact to the effect that

Lowe refused to cooperate in vocational rehabilitation without reasonable cause during the time period immediately after the initial award. As a result, the trial judge was not clearly wrong when he ordered a reduction in Lowe's disability benefits for the period of time prior to the modification proceedings and the review panel erred in reversing this portion of the trial judge's further award.

For its second assignment of error, DMI claims that the review panel erred in affirming the trial judge's further award that modified Lowe's initial award and that awarded Lowe permanent total disability benefits. In this regard, DMI argues that the medical evidence does not support an award of permanent total disability benefits and that even if such status is now warranted, because of Lowe's failure to avail himself of vocational rehabilitation services, his situation worsened and Lowe's benefits should be reduced.

[7] The modification of an earlier workers' compensation award is governed by Neb. Rev. Stat. § 48-141 (Reissue 2004), which provides, inter alia, that "at any time after six months from the date of the . . . award, an application [for modification] may be made by either party on the ground of increase or decrease of incapacity due solely to the injury." We have previously stated that to obtain a modification of a prior award, "[t]he applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made." *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 308, 622 N.W.2d 663, 667 (2001).

In support of its assignment of error objecting to the award of permanent total disability benefits, DMI argues that the trial judge erred in relying upon the medical reports and opinions of Dericks because Dericks had not treated Lowe prior to July 2004. Instead, DMI argues that the trial judge should have accepted the opinions of DMI's expert who examined Lowe prior to the initial award and also prior to the modification hearing.

[8,9] We have previously stated that when the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for

that of the compensation court. *Worline v. ABB/Alstom Power Int. CE Servs.*, 272 Neb. 797, 725 N.W.2d 148 (2006). The trial judge is entitled to accept the opinion of one expert over another. *Id.*

The record from the modification hearing contains evidence that beginning sometime in July 2004, Lowe began treating with Dericks for "gradually increasing pain in his neck, left shoulder, and left arm." Dericks' medical report dated October 19, 2005, indicates that an MRI of Lowe's cervical spine was performed in September 2004, and when he compared it to an MRI conducted in 2001, prior to the initial award, Dericks determined that "it was quite obvious that there was substantially increased posterior herniation of disk material behind the body of C6. That is to say, it appears that the disk has progressed causing further deformation of the spinal canal behind the vertebral body of the C6." Moreover, the record contains a medical questionnaire dated December 23, 2005, in which Dericks answered "Yes" when effectively asked whether Lowe's physical condition noted by Dericks in his October 19 report was "due solely to the injury he sustained as the result of his work accident while employed with" DMI.

In this case, it is apparent that the trial judge found Dericks' opinion to be credible and persuasive. Because we do not substitute our judgment regarding the credibility of expert witnesses for that of the compensation court, see *Worline v. ABB/Alstom Power Int. CE Servs., supra*, the issue before us is whether Dericks' opinion supports the trial judge's determination that there had been a material and substantial change for the worse in Lowe's condition. It was within the trial judge's authority to credit Dericks' opinion, and the opinion supports the award. Given our standard of review and the evidence in the record, we cannot say that the review panel erred in affirming the trial judge's further award modifying Lowe's initial award due to a material and substantial change for the worse in Lowe's condition and finding Lowe to be permanently and totally disabled.

Notwithstanding evidence that Lowe was permanently and totally disabled, DMI argues in its brief that under the job placement plan approved by the Workers' Compensation Court

in the initial award, there were jobs available to Lowe, and thus "had [Lowe] participated in the plan [he] would have found a job. Had [Lowe] been working at the time of [the modification hearing], it would have been difficult for [Lowe] to argue he was totally disabled." Brief for appellant at 34. At the modification hearing, DMI offered no evidence to support its assertion on appeal that participation in vocational rehabilitation services would have forestalled or prevented Lowe from becoming permanently and totally disabled and that Lowe's failure to participate in vocational rehabilitation was unreasonable as it bore on the issue of permanent and total disability. Rather than referring to evidence in support of its assertion, DMI relies on argument and the provisions of § 48-162.01(7). DMI claims that going forward, the review panel should have reduced Lowe's permanent total disability benefits otherwise payable due to his failure to participate in the court-ordered vocational rehabilitation services during the period between the initial award and the modification proceedings.

We have not previously determined which party bears the burden of proof to establish the two-part test set forth under § 48-162.01(7). However, we have discussed such burden under another provision in the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-120(2)(c) (Supp. 2007), which provision contains language similar to § 48-162.01(7). Section 48-120(2)(c) currently provides that if an injured employee "unreasonably refuses or neglects to avail himself or herself of medical or surgical treatment furnished by the employer . . . the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act." When considering this language, we have stated that "[t]he unreasonableness of the refusal of an injured employee to permit an operation to be performed is a question of fact to be determined by the evidence, and the burden of proof . . . is upon the employer." *Simmerman v. Felthauser*, 125 Neb. 795, 798, 251 N.W. 831, 833 (1934).

[10] The language used in § 48-120(2)(c) is comparable to the language used in § 48-162.01(7) now under consideration. Thus, it logically follows that under the provisions of § 48-162.01(7), the employer bears the burden of proof to

demonstrate that an injured employee has refused to undertake or failed to cooperate with a physical, medical, or vocational rehabilitation program and that such refusal or failure is without reasonable cause such that the compensation court or judge may properly rely on such evidence to suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act.

We have reviewed the record to determine whether DMI has carried its burden of proof. DMI has not directed us to evidence, and we have not located evidence in the record that supports DMI's arguments urging a reduction of benefits for the period after the modification proceedings. The record from the modification hearing contains a "Revised Loss of Earning Power Analysis," dated January 9, 2006, and prepared by a vocational rehabilitation counselor mutually agreed to by Lowe and DMI. In that report, the counselor stated that based upon Dericks' medical reports, "Lowe is not capable of obtaining a job on a full-time or a part-time basis" and that as a result, Lowe had "sustained a loss of earning power of 100% as the result of his February, 2001 work injury." It appears the trial judge relied upon this evidence when, in his consideration of Lowe's claim of permanent and total disability, he stated "there is reasonable cause not to participate [in vocational rehabilitation] because [Lowe] is totally disabled." The record supports this determination.

Earlier in this opinion, we have agreed with DMI and the trial judge that the evidence showed that Lowe lacked reasonable cause for his failure to participate in vocational rehabilitation immediately after the initial award, and we have approved of a reduction of benefits therefore. However, with respect to the period commencing with these modification proceedings, without evidence, this court "will not speculate as to what might" have ensued relative to Lowe's permanent and total disability claim had Lowe participated in the court-approved vocational rehabilitation plan. See *Simmerman v. Felthauser*, 125 Neb. at 800, 251 N.W. at 833. As to the later timeframe, DMI failed to demonstrate that Lowe refused to participate in vocational rehabilitation without reasonable cause and that had he participated in the court-ordered job placement services, he would

have been employed at the time of the modification hearing. The employer did not offer evidence upon which a trial judge should "suspend, reduce, or limit the compensation otherwise payable." § 48-162.01(7). The trial judge did not err, and the review panel did not err in affirming the trial judge's award of permanent total disability benefits. We find no merit to DMI's second assignment of error challenging the award of permanent total disability benefits.

We have considered DMI's remaining arguments made in connection with his assignments of error, and we conclude they are without merit.

## CONCLUSION

For the reasons discussed, we conclude that the Workers' Compensation Court review panel erred when it reversed the trial judge's finding that Lowe, without reasonable cause, refused to participate in court-ordered vocational rehabilitation services immediately after those services had been awarded. In all other respects, the review panel's order is affirmed. Accordingly, we reverse that portion of the review panel's order that reversed the trial judge's further award that reduced Lowe's workers' compensation benefits for a period of time pursuant to § 48-162.01(7) and remand the cause to the review panel with directions to affirm the further award entered by the trial judge in its entirety.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

# MAURICE FOKKEN, APPELLEE, V. JOHN P. STEICHEN, APPELLEE, AND COREGIS INSURANCE COMPANY, INC., GARNISHEE-APPELLANT.

# DEANNA WRIGHT MILLER, APPELLEE, V. JOHN P. STEICHEN, APPELLEE, AND COREGIS INSURANCE COMPANY, INC., GARNISHEE-APPELLANT.

744 N.W.2d 34

Filed January 4, 2008. Nos. S-06-614, S-06-615.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts.** The interpretation of an insurance policy is a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Judgments: Debtors and Creditors: Garnishment.** The claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee.
6. **Insurance: Contracts.** An insurance policy is a contract between an insurance company and an insured, and as such, the insurance company has the right to limit its liability by including limitations in the policy definitions. If the definitions in the policy are clearly stated and unambiguous, the insurance company is entitled to have such terms enforced.
7. ____: ____. Insurance contracts, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used. If the terms of the contract are clear and unambiguous, they are to be taken and understood in their plain, ordinary, and popular sense.
8. ____: ____. An ambiguity exists in an insurance contract only when the policy can be interpreted to have two or more reasonable meanings.
9. ____: ____. The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
10. **Insurance: Contracts: Proof.** The burden to prove that an exclusionary clause in a policy applies rests on the insurer.
11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

Appeals from the District Court for Douglas County: MARLON A. POLK, Judge. Reversed and remanded with directions.

Gerald L. Friedrichsen and Joshua W. Weir, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., and Jeffrey A. Goldwater, Michelle M. Bracke, and Robert A. Chaney, of Bollinger, Ruberry & Garvey, for garnishee-appellant.

James E. Harris, Britany S. Shotkoski, and Michaela Skogerboe, of Harris Kuhn Law Firm, L.L.P., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

Judgment was entered against John P. Steichen and in favor of Maurice Fokken and Deanna Wright Miller (collectively the appellees) in separate legal malpractice actions brought against Steichen. The appellees then instituted separate garnishment proceedings against Coregis Insurance Company, Inc. (Coregis). Coregis had issued Steichen's law firm a lawyers professional liability insurance policy (the Policy) which the appellees allege provides coverage for their claims against Steichen. After consolidating the appellees' cases, the district court for Douglas County entered summary judgment in favor of the appellees and against Coregis. In an amended final order, the court awarded postjudgment interest in favor of the appellees from the date judgment was entered against Steichen in the appellees' separate legal malpractice claims. In this appeal, Coregis contends that it is not obligated to indemnify Steichen. Coregis further contends that postjudgment interest should not have been entered as of the date judgments were entered against Steichen and that additional attorney fees should not have been awarded to the appellees.

## BACKGROUND

### (1) DEANNA WRIGHT MILLER

In June 1989, Miller was involved in a motor vehicle accident. Miller was ultimately represented by Steichen in litigation

related to that accident. In January 1999, Miller filed a professional liability action against Steichen. Miller alleged that without consulting her and without her authority, Steichen accepted a settlement offer in the amount of $30,000 which was not adequate to compensate her for her injuries and would have been rejected by her. Miller alleged that Steichen stipulated to the dismissal with prejudice of her lawsuit and that because the statute of limitations had run on her claim, she was barred from any further action. Miller further alleged that without her authority, Steichen signed Miller's name on a release agreement and on the back of a settlement check, endorsing that check. Miller alleged that she had not received any proceeds from the settlement.

The district court entered a judgment in favor of Miller in the amount of $325,000, which the court concluded was the fair and reasonable settlement value or jury verdict of Miller's claim had it been prosecuted in the absence of professional negligence. The court explained that Miller alleged that the following acts by Steichen constituted legal malpractice: (1) his failure to communicate to Miller all settlement offers, (2) his acceptance of a settlement offer on Miller's behalf without Miller's approval or consent, (3) his placement of Miller's signature on a release and his endorsement of the settlement check without Miller's consent, (4) his allowance of the dismissal of Miller's lawsuit with prejudice after the statute of limitations had expired, and (5) his breach of professional and fiduciary duties to act in the best interests of his client. After judgment was entered in Miller's favor, Miller instituted garnishment proceedings against Coregis, which issued a professional liability policy that is alleged to provide coverage for Miller's legal malpractice claim against Steichen. Miller served a summons and order of garnishment and interrogatories in aid of execution on Coregis. The summons was sent to "Sally Ann Hawk," who was listed in Coregis' 2000 annual statements as the chairperson, president, and chief executive officer. Coregis did not respond, and following a hearing on the matter, the district court entered a default judgment against Coregis.

Thereafter, Coregis filed a special appearance, arguing that it did not receive proper and sufficient service of summons, the

affidavit and praecipe for summons were improperly issued, and there was no merit to Miller's contention that Coregis was indebted to Steichen under the Policy. The district court overruled Coregis' special appearance. Coregis then filed a motion to vacate the default judgment, which was also overruled by the district court. In *Miller v. Steichen*,[1] this court reversed the judgment of the district court and remanded the cause with directions to the district court to vacate the default judgment and give Coregis reasonable time in which to file an appropriate responsive pleading.

(2) MAURICE FOKKEN

Fokken was involved in a motor vehicle accident in December 1991. Fokken ultimately retained Steichen to represent him in the litigation pertaining to that accident. In December 1997, Fokken filed a professional liability action against Steichen. Fokken alleged that without Fokken's authority, Steichen accepted a settlement offer in the amount of $8,627.57 and stipulated to the dismissal with prejudice of Fokken's lawsuit after the statute of limitations had run on Fokken's claim. Fokken further alleged that without Fokken's knowledge or consent, Steichen signed Fokken's name and the name of his ex-wife on a release agreement and on the back of a settlement check, endorsing that check, and that Fokken had not received the proceeds of the settlement check.

The district court granted summary judgment in favor of Fokken on the issue of liability and on the issue of damages against Steichen. The court entered judgment against Steichen in the amount of $50,000. That amount included $40,000, which the court concluded to be the fair and reasonable settlement value or jury verdict of Fokken's claim had it been prosecuted in the absence of professional malpractice, and $10,000 in attorney fees. The court explained that Fokken alleged that the following acts by Steichen constituted legal malpractice: (1) his failure to communicate with Fokken all settlement offers, (2) his acceptance of a settlement offer on Fokken's behalf without approval or consent by Fokken, (3) his allowance of

[1] *Miller v. Steichen*, 268 Neb. 328, 682 N.W.2d 702 (2004).

Fokken's lawsuit to be dismissed with prejudice after the statute of limitations had expired, and (4) his breach of his professional fiduciary duty to act in Fokken's best interest. The court entered judgment in favor of Fokken in the amount of $50,000. After judgment was entered in Fokken's favor, Fokken instituted garnishment proceedings against Coregis. Like Miller, Fokken alleged that the Policy issued by Coregis provided coverage for Fokken's claims against Steichen.

(3) Consolidation of Fokken's and Miller's Cases

The district court consolidated the appellees' cases against Coregis. Thereafter, Coregis filed an amended answer to garnishment interrogatories alleging the Policy did not provide coverage for the claims made by the appellees. The appellees then filed an amended application to determine Coregis' liability.

All parties moved the district court for summary judgment. In its motion, Coregis asserted that it had no obligation to indemnify Steichen because Steichen executed a policyholder release in favor of Coregis. Coregis asserted before the district court that in exchange for Coregis' agreement to relinquish its rights to defend, investigate, and negotiate with regard to Fokken's claim under the Policy, Steichen executed a policyholder release wherein Steichen and his law firm released Coregis from any and all liability based upon, arising out of, or relating in any manner to Fokken's lawsuit against Steichen. Coregis further asserted that it had no obligation to indemnify Steichen because exclusions A and L of the Policy precluded coverage for the judgments obtained by the appellees. Exclusion A of the Policy provides that the Policy does not apply to "any CLAIM that results in a final adjudication against any INSURED that an INSURED has committed any criminal, dishonest, fraudulent or malicious acts, errors, omissions or PERSONAL INJURIES." Exclusion L of the Policy provides that the Policy does not apply to "any CLAIM arising out of conversion, misappropriation or improper commingling of funds."

The district court denied Coregis' motion for summary judgment, but granted the appellees' motion for summary judgment. The court found that exclusion A does not preclude coverage

because the summary judgments entered against Steichen did not adjudge him to have committed criminal, dishonest, or fraudulent conduct. The court also found that Steichen's disbarment by this court was not dispositive. The district court explained that exclusion A applies to claims and that the definitions section of the Policy "provides a separate definition for 'disciplinary proceeding', which does not include any mention of the word 'claim.'" The court also found that exclusion L does not preclude coverage. The court explained that Coregis incorrectly argued the genesis of the appellees' malpractice claims against Steichen because he wrongly kept, or converted, the proceeds from settlements he failed to disclose to the appellees. The court instead found that the appellees' malpractice claims stemmed from Steichen's failing to communicate settlement offers and Steichen's agreeing to the dismissal of the appellees' claims after the statute of limitations had run without the appellees' knowledge. The court further found that the policyholder release is void as against public policy and unenforceable. The court stated that Coregis and Steichen contracted for legal malpractice insurance and that upon receipt of notice of Fokken's legal malpractice claim against Steichen, Coregis had a duty, not a right, to defend Steichen. The district court further stated that permitting Steichen to release Coregis after a claim had been filed and received by both parties is against public policy and unlawfully deprives Fokken of the ability to pursue financial redress against Steichen. The district court entered judgment in favor of Fokken and against Coregis in the amount of $50,058. The court entered judgment in favor of Miller and against Coregis in the amount of $325,058.

The appellees filed a motion requesting the district court to enter a final order taxing costs, including a reasonable attorney fee, and computing the amount of interest owing on the underlying original judgments entered against Steichen, in order to determine the specific dollar amount of judgment against Coregis. On April 12, 2006, the district court entered an order in which it determined in part that the appellees are entitled to postjudgment interest from the date of the district court's January 25 judgment. The appellees filed a motion requesting the court to reconsider its calculation of the court's postjudgment

interest. In an amended final order, the district court determined that the appellees are entitled to postjudgment interest from the dates of their original judgments against Steichen. For Fokken, that date is October 24, 2001, and for Miller, that date is June 28, 2001. The court awarded Fokken interest in the amount of $12,269.24 and Miller interest in the amount of $85,427.12. In addition, the court corrected the judgment amount entered in Miller's favor to $360,058. Coregis now appeals.

## ASSIGNMENTS OF ERROR

Coregis asserts the following assignments of error on appeal: The district court erred in (1) denying Coregis' motion for summary judgment and in granting the appellees' motion for summary judgment; (2) failing to find that exclusion L of the Policy precludes coverage for the judgments entered in favor of the appellees and against Steichen; (3) failing to find that exclusion A of the Policy precludes coverage for the judgments entered in favor of the appellees and against Steichen; (4) failing to enter an adjudication in connection with exclusion A that Steichen committed dishonest and fraudulent acts in the course of his representation of the appellees; (5) failing to find that the release signed by Steichen precludes coverage under the Policy for the judgment entered in favor of Fokken and against Steichen; (6) finding that the release signed by Steichen is unenforceable on the basis that it violates Nebraska public policy; (7) finding that the appellees are entitled to postjudgment interest from the date of the entry of the judgments in favor of the appellees and against Steichen, instead of from the date that judgment was entered against Coregis; and (8) awarding additional attorney fees to the appellees.

## STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a

[2] *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

[3,4] The interpretation of an insurance policy is a question of law.[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[5]

## ANALYSIS

### Motions for Summary Judgment

Coregis contends that the district court erred in denying its motion for summary judgment and in granting the appellees' motion for summary judgment. Coregis asserts that summary judgment should have been entered in its favor because exclusions A and L of the Policy preclude coverage for the appellees' claims.

[5] The question of whether Coregis has funds belonging to Steichen which the appellees now seek to garnish depends on whether coverage under the Policy was precluded by any policy exclusions. The claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee.[6] If Coregis does not owe a duty to indemnify Steichen under the Policy, there are no funds in the hands of Coregis to be garnished by the appellees.

Before we address Coregis' claim that coverage is precluded under the Policy based upon exclusions A and L, we must first determine whether Coregis may challenge coverage based on those exclusions. The appellees contend that under *Metcalf v. Hartford Acc. & Ind. Co.*,[7] Coregis may not now allege that

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[3] *Id.*

[4] *Jones v. Shelter Mut. Ins. Cos.*, *ante* p. 186, 738 N.W.2d 840 (2007).

[5] See *id.*

[6] *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

[7] *Metcalf v. Hartford Acc. & Ind. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964).

coverage is precluded under the Policy exclusions. In *Metcalf*, we stated that where an insurance company is notified of a pending suit against an insured and has a full opportunity to defend the action, the judgment against the insured, if obtained without fraud or collusion, will be conclusive against the insurance company.

Coregis is not attacking the judgments obtained by the appellees against Steichen. Rather, it is asserting that it is not liable to pay those judgments because its coverage is excluded under the terms of the Policy. Because Coregis' liability under the terms of the Policy was not litigated in the appellees' separate actions against Steichen, we determine that the appellees' argument is without merit.

[6] An insurance policy is a contract between an insurance company and an insured, and as such, the insurance company has the right to limit its liability by including limitations in the policy definitions.[8] If the definitions in the policy are clearly stated and unambiguous, the insurance company is entitled to have such terms enforced.[9]

[7-10] Insurance contracts, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used. If the terms of the contract are clear and unambiguous, they are to be taken and understood in their plain, ordinary, and popular sense.[10] An ambiguity exists only when the policy can be interpreted to have two or more reasonable meanings.[11] The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.[12] We explained in *O'Toole v. Brown*:

> "'"[T]he parties to an insurance contract may make the contract in any legal form they desire, and . . . insurance

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[8] *Jones v. Shelter Mut. Ins. Cos.*, *supra* note 4.

[9] *Id.*

[10] *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982).

[11] *O'Toole v. Brown*, 228 Neb. 321, 422 N.W.2d 350 (1988).

[12] *Hillabrand v. American Fam. Mut. Ins. Co.*, 271 Neb. 585, 713 N.W.2d 494 (2006).

> companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.'"[13]

The burden to prove that an exclusionary clause in a policy applies rests on the insurer.[14]

Exclusion L unambiguously provides that coverage under the Policy is excluded for "any CLAIM arising out of conversion, misappropriation or improper commingling of funds." A claim is defined as "a demand made upon any INSURED for DAMAGES, including, but not limited to, service of suit or institution of arbitration proceedings against any INSURED." The question presented here is whether the appellees' claims arise out of conversion, misappropriation, or the improper commingling of funds.

The appellees argue that their claims against Steichen are based on Steichen's failure to communicate settlement offers and his dismissal of their lawsuits outside the statute of limitations, thereby preventing them from obtaining fair compensation for their injuries. The appellees argue that although Steichen may have committed acts of conversion, misappropriation, and/or the commingling of funds, these acts were not the proximate cause of the appellees' damages.

In *O'Toole*,[15] this court was asked to determine whether the phrase "'arising out of the actions of any horses'" required more than a causal connection between the actions of the horses and the accident or injury. Noting that the court was rendering an opinion on the theoretical meaning of a phrase in an insurance policy under the facts presented, this court concluded that "arising out of" does not require more than a causal connection between the accident and injury.[16] Thus, in this case, the phrase

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[13] *O'Toole v. Brown, supra* note 11, 228 Neb. at 326, 422 N.W.2d at 353.

[14] *Peterson v. Ohio Casualty Group, supra* note 2.

[15] *O'Toole v. Brown, supra* note 11, 228 Neb. at 323, 422 N.W.2d at 352.

[16] See *id.*

"any CLAIM arising out of conversion, misappropriation or improper commingling of funds" does not require more than the existence of a causal connection between the claim and any alleged conversion, misappropriation, or improper commingling of funds by Steichen.

The appellees each made a claim against Steichen for legal malpractice. In the district court's order granting summary judgment in favor of Miller, the court found that Miller had alleged Steichen endorsed Miller's settlement check, which amounted to $30,000, without Miller's authority. In the district court's order granting summary judgment in favor of Fokken, the court found that Fokken had alleged Steichen endorsed Fokken's settlement check, which amounted to $8,627.57, without Fokken's knowledge or consent. In the separate answers filed by Steichen in each of these cases, Steichen admits that he did not pay to either Miller or Fokken her or his share of the settlement proceeds.

Steichen's endorsement of Miller's and Fokken's names on the settlement checks and his retention of the settlement proceeds constituted conversion, misappropriation, and improper commingling of funds. These are exactly the activities excluded under exclusion L of the Policy.

Although Steichen's withholding of the settlement proceeds may not be the sole basis for the appellees' claims, those actions were causally connected. Because coverage under the Policy is precluded under exclusion L, we determine that coverage for the amounts converted, misappropriated, and improperly commingled are not covered under the Policy. In Miller's case, that amount is $30,000, and in Fokken's case, that amount is $8,627.57. We must further determine, however, whether the balance of the judgments against Steichen are precluded under the provisions of the Policy.

Exclusion A of the Policy unambiguously provides that coverage under the Policy is excluded for "any CLAIM that results in a final adjudication against any INSURED that an INSURED has committed any criminal, dishonest, fraudulent or malicious acts, errors, omissions or PERSONAL INJURIES." The appellees argue that although Steichen's acts of forgery and his conversion of settlement funds to his own use may be criminal,

dishonest, fraudulent, or malicious, it was not those acts upon which they obtained their judgments against Steichen.

In its order granting Fokken's motion for summary judgment, the district court stated the following:

> [Fokken] alleges in his Petition and . . . Steichen admits in his Answer previously filed herein that . . . Steichen accepted a settlement offer from State Farm Automobile Insurance Company without [Fokken's] authority and stipulated to a dismissal of his lawsuit, Steichen signed a Release and endorsed a settlement check without [Fokken's] knowledge or consent, which act [Fokken] claims herein constitute legal malpractice on the part of . . . Steichen, including, but not limited to . . . Steichen's: a) failure to communicate to [Fokken] all settlement offers; b) in accepting a settlement offer on [Fokken's] behalf without approval or consent of [Fokken]; c) in allowing a lawsuit to be dismissed with prejudice after the statute of limitations would bar any further action; and d) in breaching his professional fiduciary duty to act in the best interest of his client. The Court specifically recognizes all of the above allegations to be well-accepted theories of recovery under legal malpractice or professional negligence and constituting a departure below the generally accepted standard of care for attorneys practicing in Omaha, Douglas County, Nebraska, or similar communities.

Without further explanation, the district court went on to enter judgment against Steichen on the issue of liability.

In paragraph 3 of its order granting Miller's motion for summary judgment, the district court noted that the acts by Steichen allegedly constituting legal malpractice included, but were not limited to,

> Steichen's (a) failure to communicate to [Miller] all settlement offers; (b) in accepting a settlement offer on [Miller's] behalf without the approval or consent of [Miller]; (c) in placing [Miller's] signature on the Release and endorsing the settlement check without [Miller's] authority; (d) in allowing the lawsuit to be dismissed with prejudice after the statute of limitations would bar any further claims; and

(e) in breaching his professional and fiduciary duties to act in the best interests of his client.

The district court went on to find that Miller's motion for summary judgment on the issue of liability "should be granted in its entirety on the basis plead [sic] and set forth above in paragraph 3(a-e)."

With regard to Fokken, we read the district court's order as finding that the allegations that Steichen signed Fokken's name on the release and settlement check without Fokken's authorization were among those allegations constituting legal malpractice and, therefore, adjudicating Steichen of those actions. With regard to Miller, the court found that Steichen's unauthorized signature of Miller's name, among other acts, constituted legal malpractice. Thus, Steichen was adjudicated of those acts in Miller's case as well. Steichen's unauthorized endorsement of Miller's and Fokken's names constituted a dishonest act. Because the district court in both Fokken's and Miller's cases adjudicated Steichen of committing those dishonest acts, coverage is precluded under exclusion A of the Policy for the balance of the appellees' judgments against Steichen.

### Remaining Assignments of Error

[11] Because we have determined that coverage under the Policy is precluded under exclusions A and L, we do not address Coregis' remaining assignments of error. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.[17]

## CONCLUSION

For the reasons discussed above, we determine that the district court erred in granting the appellees' motion for summary judgment and in denying Coregis' motion for summary judgment. Accordingly, we reverse, and remand with directions to the district court to grant Coregis' motion for summary judgment.

Reversed and remanded with directions.

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[17] *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007).

# STATE OF NEBRASKA, APPELLEE, V. NORMA E. LOPEZ, APPELLANT.

743 N.W.2d 351

Filed January 4, 2008. No. S-06-1251.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
3. **Effectiveness of Counsel: Pleas: Plea Bargains.** The standard established under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), applies to guilty pleas based on ineffective assistance of counsel and in cases involving the alleged failure to communicate the offer of a plea agreement.
4. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
5. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
6. **Effectiveness of Counsel: Plea Bargains.** In order to establish prejudice in a case in which a plea agreement was not communicated to the defendant, the defendant must demonstrate a reasonable probability that, but for counsel's deficiency, he or she would have accepted the plea.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

## INTRODUCTION

Norma E. Lopez was convicted of first degree murder and use of a weapon to commit a felony. Her convictions and sentences were affirmed by this court in *State v. Lopez*.[1] Lopez filed a verified motion for postconviction relief which was denied after an evidentiary hearing. Lopez appeals.

## FACTS

The facts surrounding Lopez' convictions were set forth in *Lopez*. We supplement those facts as necessary.

> On March 25, 1994, the defendant had a party in her trailer home. During the course of the party, the defendant and a guest, Sotero Gandarilla, started to argue. The argument continued while the defendant and Gandarilla went into a bedroom in the defendant's home. The defendant's daughter was sitting in the bedroom, and the defendant asked the daughter to find the bullets for her gun. The daughter told the defendant that she did not know where the bullets were and then went to a neighbor's house for help.
>
> Upon returning to the home of the defendant, the daughter heard a gunshot. Upon entering the bedroom, witnesses saw Gandarilla's body on the floor and the defendant holding a gun.[2]

At this point, the witnesses who saw Lopez standing over Sotero Gandarilla left Lopez' home. Lopez' daughter then returned with the neighbor. The neighbor testified that she asked Lopez "'[w]hy did you do it?'" Lopez responded that Gandarilla had told her that "she was not . . . the woman for [him]." The

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[1] *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996).

[2] *Id.* at 637, 544 N.W.2d at 850.

neighbor then helped Lopez and four of Lopez' children get back to the neighbor's home, where Lopez attempted to call relatives. According to the neighbor, Lopez was not able to dial the telephone, nor was Lopez able to provide to the neighbor the correct telephone number so that the neighbor could place the call for Lopez. The neighbor testified that Lopez then left the neighbor's home, apparently to retrieve a fifth daughter who remained in Lopez' home.

At about the same time, the record establishes that

> [t]he police [had] responded to a call of someone hearing a gunshot. An officer went to the defendant's home. The officer knocked and the defendant appeared. The officer asked if he could enter, and the defendant replied that he could not and that she would check the trailer for him. Soon after, the defendant returned to the front door of the trailer and stated to the officer, "He's dead; he's been shot." She initially refused to give the name of the victim.
>
> The officer asked, "Can I come in and check?" to which the defendant answered, "Yes, you can." The officer found the body. The officer asked her the identity of the individual on the floor and the defendant's name and her date of birth, to which the defendant responded, "What? Do you think I shot him?" At that point, the officer informed the defendant of her *Miranda* rights. The officer asked if the defendant waived her rights and wanted to talk to him, to which she replied, "Yeah." It appeared to the officer that the defendant had been drinking and had apparently urinated on herself, but that she understood the questions and the situation. Several times during the preliminary investigation, the defendant told the officer, "Why don't you just go ahead and shoot me?" . . .
>
> At that point, Lt. Rodger L. Williams arrived to take over the investigation. A high-powered rifle with one spent round in its chamber was found in the bedroom.
>
> The defendant was jailed. An interview of the defendant by Williams took place the next morning at 8 o'clock at the jail at the defendant's request. The defendant signed a *Miranda* rights waiver. During the interview, Williams

asked if the defendant knew why the shooting had occurred, to which the defendant stated, "Yes, because I shot him for no goddamn reason. Just for . . . being drunk and stupid I know." In response to a question as to whether the events of the previous evening occurred because the defendant had been drinking, she responded, "Oh, no, no, no. I have been that drunk before and never pulled a gun on my old man." The ammunition for the gun was found following a search pursuant to a search warrant.

It was later determined that "[t]he death of Sotero Gandarilla [was] due to a perforating gunshot wound to the neck, which caused a marked destruction of the soft tissue of the neck, severed the internal carotid artery, severed the internal and external jugular veins and, also, severed the larynx."[3]

At trial, Lopez was represented by two attorneys with the Hall County public defender's office. That office also represented Lopez on direct appeal. This court affirmed Lopez' convictions.

On April 1, 2003, Lopez filed a verified motion for postconviction relief. An amended motion was filed on March 5, 2004. That motion alleged ineffective assistance of counsel in several particulars. The district court granted an evidentiary hearing. At the hearing, depositions of Lopez and both trial counsel were introduced into evidence. In addition, Lopez and lead counsel testified. On October 17, 2006, Lopez' motion was denied. In its order, the district court specifically addressed Lopez' contention that a plea agreement was not communicated to her, finding that Lopez suffered no prejudice from trial counsel's deficiencies. As to Lopez' other allegations, the district court generally concluded that it could not "find from the evidence that counsel's performance was deficient and that any deficient performance prejudiced the defense."

## ASSIGNMENTS OF ERROR

On appeal, Lopez argues that the district court erred in denying her motion for postconviction relief. In particular, Lopez

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[3] *Id.* at 637-38, 544 N.W.2d at 850-51.

contends, restated and renumbered, that the district court erred by not finding that her trial counsel was ineffective in (1) failing to adequately inform her of plea offers and in failing to pursue plea offers on her behalf, (2) failing to object to the State's reliance of Lopez' invocation of her right to remain silent, (3) failing to challenge the State's contention that Lopez had animosity or malice against Gandarilla, (4) failing to adequately present opening statements, (5) failing to properly challenge the testimony of the State's fingerprint evidence expert and in failing to present expert testimony to counter the State's expert, and (6) failing to adequately advise Lopez of her right to testify in her own behalf.

## STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[4] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[5] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[6] an appellate court reviews such legal determinations independently of the lower court's decision.[7]

## ANALYSIS

[2,3] On appeal, Lopez assigns as error that the district court failed to find that her trial counsel was ineffective in several particulars. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland*,[8] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a

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[4] *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

[5] *Id.*

[6] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[7] *State v. Sims, supra* note 4.

[8] *Strickland v. Washington, supra* note 6.

lawyer with ordinary training and skill in criminal law in the area.[9] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[10] In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[11] The two prongs of this test, deficient performance and prejudice, may be addressed in either order. This standard also applies to guilty pleas based on ineffective assistance of counsel[12] and in cases involving the alleged failure to communicate the offer of a plea agreement.[13]

[4,5] In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.[14] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[15]

*Failure to Communicate Plea Agreement.*

Lopez first argues that she received ineffective assistance of trial counsel with respect to plea negotiations. In particular, Lopez contends that a plea agreement for second degree murder was not communicated to her.

At the postconviction evidentiary hearing, the parties stipulated that an offer of second degree murder and use of a weapon had been communicated to defense counsel prior to trial. In overruling Lopez' motion with respect to this allegation, the district court, in keeping with this stipulation, found that Lopez' trial counsel failed to convey that agreement to Lopez. However,

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[9] *State v. Sims*, *supra* note 7.

[10] *Id.*

[11] *Id.*

[12] *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). See, also, *State v. Malcom*, 12 Neb. App. 432, 675 N.W.2d 728 (2004).

[13] *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001); *Engelen v. U.S.*, 68 F.3d 238 (8th Cir. 1995); *Toro v. Fairman*, 940 F.2d 1065 (7th Cir. 1991); *Dew v. State*, 843 N.E.2d 556 (Ind. App. 2006).

[14] *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007).

[15] *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005).

the district court concluded that Lopez was not prejudiced by this failure, as Lopez had not demonstrated that she would have accepted the offer.

At the evidentiary hearing, lead counsel testified that he recalled the State's making one plea offer for first degree murder in which the State would decline to pursue the death penalty. Lead counsel indicated he did not believe this offer was a good offer, as he found it unlikely that Lopez would be sentenced to death, but he brought the offer to Lopez. He recalled that Lopez thought about the offer for a few days, but indicated that Lopez was "adamant" about rejecting the offer. Second chair counsel, in his deposition, echoed this, testifying that Lopez wanted to go to trial because she did not remember what happened at the time of the shooting. According to lead counsel, he and second chair counsel suggested later that Lopez offer to plead guilty to manslaughter and use of a weapon, but Lopez refused to let counsel make this offer to the State and insisted upon going to trial.

Both counsel also testified that Lopez seemed to generally understand what was going on in connection with the charges filed against her. Lead counsel testified that he attempted to discuss with Lopez the events surrounding the murder, but that Lopez always indicated she did not remember what had happened. Lead counsel indicated that he met with Lopez once or twice a week for about an hour each time. It is not clear from the record, but it appears these meetings occurred over a somewhat lengthy period of time prior to trial. Lead counsel also testified that he went over police reports with Lopez; provided to Lopez copies of depositions taken in the case; and, as a matter of course, would have discussed the State's evidence and witnesses against Lopez in general terms, including forensic evidence. Lead counsel also indicated it was his recollection that Lopez was present at the formal hearings held in the case, which included a suppression motion.

Lopez testified that only one offer, which involved serving between 20 and 40 years in prison, was communicated to her. Lopez specifically testified that no offer to plead guilty to second degree murder was ever communicated to her and that if such had been offered, she would have accepted.

Lopez generally testified that she had expressed a desire to know what had happened at the time of Gandarilla's death, but that if she could have found out without going to trial, that would have been acceptable. Lopez testified that she received no copies of police reports or depositions and did not recall attending any hearings in the case. Lopez also indicated that even at the time of the postconviction evidentiary hearing, she was uncertain as to the difference between no contest and guilty pleas, and that had she understood the difference before trial, she would have pled no contest or guilty.

As an initial matter, we conclude that the district court's finding that Lopez' counsel failed to communicate the plea agreement in question to Lopez was not clearly erroneous. We further conclude that such failure was deficient as a matter of law. However, we also agree with the district court that Lopez has not demonstrated that she would have accepted the plea agreement for second degree murder. As such, Lopez cannot show she was prejudiced by counsel's failure to communicate the plea agreement.

The prejudice inquiry in cases involving plea agreements focuses upon whether counsel's ineffective performance affected the outcome of the plea process.[16] Various standards exist for determining whether a defendant has made a showing of prejudice. For example, in the Eighth Circuit, "[t]o establish prejudice . . . the movant must show that, but for his counsel's advice, he would have accepted the plea. To command an evidentiary hearing, the movant must present some credible, nonconclusory evidence that he would have pled guilty had he been properly advised."[17]

However, the Seventh Circuit, citing *Strickland*, requires a defendant to "establish through objective evidence that there is a reasonable probability that, but for counsel's advice, he would have accepted the plea."[18] The Sixth Circuit largely concurs with the Seventh Circuit's standard, except it notes that

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[16] See *Hill v. Lockhart, supra* note 12.

[17] *Engelen v. U.S., supra* note 13, 68 F.3d at 241.

[18] *Toro v. Fairman, supra* note 13, 940 F.2d at 1068.

"*Strickland* . . . only requires that a defendant demonstrate that there is a 'reasonable probability' that the result of the proceeding would have been different. The Supreme Court has imposed no requirement that the defendant meet his burden of proof through objective evidence."[19]

[6] We concur with the Sixth Circuit's reading of *Strickland* and hold that the defendant must demonstrate a "reasonable probability" that, but for counsel's deficiency, he or she would have accepted the plea. We conclude, however, that Lopez cannot meet this standard.

A review of the record reveals that Lopez testified she did not understand the difference between guilty and no contest pleas. Lopez contends that had she understood that difference, she would have pled guilty or no contest to the plea agreement for second degree murder offered by the State. Lopez stated during her testimony that she did not remember the shooting and thought trial was the only way to find out what happened. Lopez claimed that trial counsel did not share any of the State's case with her and that had they done so, she would have accepted that version of events and not gone to trial.

However, evidence was introduced by the State that contradicts Lopez' assertion that she would have pled guilty to second degree murder. Both counsel testified that Lopez rejected one plea agreement and refused to let them approach the State with another suggested agreement—this one for manslaughter. They both testified that Lopez wanted to go to trial, with lead counsel testifying that she was "adamant" about it.

Moreover, Lopez' contention that she was not informed as to the State's case against her is contradicted by lead counsel's testimony. He testified that he met with Lopez, provided to her copies of the depositions taken in the case, and outlined the State's case and evidence against her. He further testified that Lopez was present at the formal hearings in her case, a fact confirmed by a review of the various bills of exceptions from those hearings.

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[19] *Magana v. Hofbauer, supra* note 13, 263 F.3d at 547 n.1. See, also, *Dew v. State, supra* note 13.

The district court found Lopez' contention that she would have pled guilty to be not credible. We conclude that this finding of fact was not clearly erroneous. Lopez did not meet her burden—she has not shown there was a reasonable probability that she would have accepted the second degree murder plea agreement offered by the State. As such, Lopez' first assignment of error is without merit.

*Right to Remain Silent.*

Lopez next argues that the State improperly relied upon her invocation of her right to remain silent and that her counsel was ineffective for failing to object accordingly. Lopez argues that the State's actions violated *Doyle v. Ohio*.[20]

In *Doyle*, the U.S. Supreme Court held that the State may not "seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest."[21] In discussing *Doyle,* this court has noted also that *Doyle* stands for the proposition that "a defendant's postarrest, post-*Miranda* silence is 'insolubly ambiguous' as to whether the defendant is guilty or merely exercising his rights in accordance with the implicit assurance in the *Miranda* warnings that 'silence will carry no penalty.'"[22]

The State, in its closing arguments, made the following comments of which Lopez now complains:

> When Sergeant Ochsner reads her her Miranda rights, she says, "I understand them." No evidence to the contrary.
>
> When she gets to the jail, if you'll remember testimony of the Corrections Officer Gorman and Lieutenant Castleberry, Corrections Officer Gorman tells you that when they are trying to ask a question and she won't answer, what does she do, in fact? If Castleberry asks her a question, she turns around and faces Gorman and vice versa.

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[20] *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

[21] *Id.*, 426 U.S. at 611.

[22] *State v. Harms*, 263 Neb. 814, 822-23, 643 N.W.2d 359, 369 (2002).

> She knows she doesn't have to answer questions, and she won't . . . .

The State contends that these statements in closing arguments were simply a proper comment on Sgt. Ronald Gorman's testimony at trial that when Lopez "'was originally brought in, she would not answer any questions'" and "'[i]f you did ask her [a] question, she would just turn away from you and not talk.'"[23] The State argues that this testimony was not objected to at trial and such is not raised now, thus Lopez has waived any error. Alternatively, the State contends that the statement in closing was not a *Doyle* violation or that any error which may have occurred was harmless.

As an initial matter, we disagree that the statements in closing were simply a proper comment on the evidence. To the extent that the prosecutor noted the content of the testimony of Lt. James Castleberry and corrections officer Cynthia Gorman, the statements can be considered a proper comment on the evidence. However, the prosecutor also noted that Lopez "knows she doesn't have to answer questions, and she won't." This statement could be read as inviting the jury to speculate as to the reasons behind Lopez' silence.

We also disagree with the State that the prosecutor's comment in closing was not a *Doyle* violation. The apparent basis for the State's argument is that in *Doyle*, the defendant's silence was not admissible to impeach the defendant's testimony at trial. However, in this case, Lopez' silence was not used to impeach her testimony at trial, since she did not testify.

Though *Doyle* did involve the impeachment of a defendant's trial testimony, we do not believe it is limited to such circumstances. In *Wainwright v. Greenfield*[24]—a case in which the defendant did not testify—the prosecution was prohibited from relying on a defendant's postarrest, post-*Miranda* silence as substantive evidence of the defendant's sanity. Moreover, the reasoning behind both *Doyle* and *Wainwright* is the fundamental unfairness implicit in promising a defendant his or her silence

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[23] Brief for appellee at 35.

[24] *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).

will not be used against him or her, then essentially using that silence against the defendant. We conclude that the State's comments in closing were a violation of *Doyle*.

Assuming that Lopez' counsel was deficient in failing to object to the State's violation of *Doyle*, Lopez still cannot show a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Evidence beyond a reasonable doubt was presented at trial showing that Lopez was guilty of first degree murder. There was testimony that Lopez and Gandarilla had been arguing before the shooting. Lopez' daughter testified that she was asked by her mother to "find the bullets." Lopez herself made certain statements suggesting her guilt and informed her neighbor that she shot Gandarilla because he told her that she was "not the woman for [him]." In addition, police testified that Lopez indicated she shot Gandarilla for "no good reason," but because she was "drunk and stupid." Lopez further indicated that she had "been that drunk before" but had "never pulled a gun on [her] old man." Lopez has not shown that she was prejudiced by any deficiency by counsel in failing to object to any *Doyle* violation made by the State. As such, Lopez cannot show that counsel was ineffective. Lopez' second assignment of error is without merit.

*Remaining Assignments of Error.*

Lopez makes several other contentions regarding the alleged ineffectiveness of counsel. We have reviewed the record and conclude those allegations are also without merit. We therefore reject Lopez' third through sixth assignments of error.

## CONCLUSION

For the reasons stated above, we conclude that Lopez' counsel was not ineffective and, accordingly, affirm the district court's denial of postconviction relief.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. JOHN PIEPER, APPELLANT.

743 N.W.2d 360

Filed January 4, 2008. No. S-07-057.

1. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
4. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
5. **Criminal Law: Pretrial Procedure.** Discovery in a criminal case is, in the absence of a constitutional requirement, controlled by either a statute or a court rule.
6. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
7. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
8. **Motions for New Trial: Effectiveness of Counsel.** Ineffective assistance of counsel is not a ground upon which a defendant may move for new trial under Neb. Rev. Stat. § 29-2101 (Cum. Supp. 2006).
9. **Double Jeopardy: Habitual Criminals: Sentences.** Nebraska's habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Cum. Supp. 2006), does not violate the Double Jeopardy Clause because an enhanced sentence under the provisions of the habitual criminal laws is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Jessica L. Milburn for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

## NATURE OF CASE

John Pieper was convicted in the district court for Lancaster County of first degree assault and false imprisonment in the first degree. Pieper appeals his convictions and his sentencing as a habitual criminal. We affirm.

## STATEMENT OF FACTS

The State charged Pieper with first degree assault, first degree sexual assault, and false imprisonment in the first degree. The State amended the information to charge Pieper as a habitual criminal. The charges arose out of incidents that occurred on July 11 and 12, 2004, and involved Pieper; a codefendant, Jeremiah Croghan; and the victims, Vernon French and A.N. Pieper, Croghan, French, and A.N. testified at trial and gave accounts of the incidents which varied in certain respects. There is no claim that the evidence is insufficient, and taking the evidence favorably to the State, we summarize the evidence as follows.

In July 2004, French was living with his girlfriend, A.N. They were in their apartment on the night of July 11, listening to music. Late that night, Croghan and Pieper came to the door of the apartment and told French and A.N. that they had heard the music and wanted to introduce themselves. Croghan had recently moved into an apartment down the hall.

Accounts vary regarding which persons drank whiskey or beer, took Xanax, or smoked marijuana that night. At some point in the evening, arguments ensued and French was beaten. French was hospitalized for 5 to 7 days with injuries from the assault. Pieper was convicted of the assault in this case. There was testimony that at one point, Pieper held a knife to A.N.'s throat and took her to Croghan's apartment. Pieper was convicted of false imprisonment with respect to A.N. There was also testimony that A.N. was sexually assaulted. Pieper was found not guilty of this charge.

A tape recording of an interview French gave to a police officer was entered into evidence during the officer's testimony, but no portion of the tape recording was played to the jury. A transcription of the tape recording of another police officer's interview with French was also entered into evidence during that police officer's testimony, but no part of the transcription was read to the jury. Pieper's counsel did not object to admission of the tape or the transcription.

A tape recording of an interview A.N. gave to a police officer was marked as an exhibit, but there is no indication in the record that the tape was offered or admitted into evidence. No portion of the tape recording was played to the jury.

Croghan testified at Pieper's trial in a manner which was generally unfavorable to Pieper. Included in that testimony was a description of Pieper's hitting French and threatening French with a knife. In his initial statements to police on July 14, 2004, Croghan's recounting of events was generally similar to his trial testimony. In contrast to the trial testimony, on May 2, 2005, Croghan gave a deposition which was more favorable to Pieper and painted a picture in which French had been an aggressor and Croghan had kicked French. Weeks before Pieper's trial, on February 22, 2006, the prosecutor in this case asked a police officer to contact Croghan to ask how he would testify at trial. Prior to the conversation, the officer thought that Croghan "was going to claim all responsibility of wrong doing [sic] in this case." However, Croghan told the officer that he had lied in his deposition because he was being threatened by Pieper's associates. Croghan told the officer that at trial, he planned to tell the truth, which more closely tracked his original statement to police in which Croghan stated that Pieper had assaulted French. The officer called the prosecutor on February 22 to orally report on the conversation, but the officer did not prepare a written report of the conversation until April 11, after Pieper's trial had begun. On April 12, the third day of Pieper's trial, and prior to Croghan's testimony, Pieper moved to dismiss based on prosecutorial misconduct because he had not been provided a copy of the officer's report of the February 22 conversation with Croghan until that day. The court overruled

the motion to dismiss. Pieper then made a motion for mistrial, which the court also overruled.

Pieper testified in his own defense. In his testimony, Pieper stated that French had been an aggressor and that it was Croghan who had hit French. Pieper denied that he ever punched, kicked, or stomped on French.

The jury returned a verdict on April 18, 2006, finding Pieper guilty of first degree assault and false imprisonment but not guilty of sexual assault. On April 21, Pieper filed a motion for new trial based on general allegations of irregularities and misconduct. On May 3, Pieper filed a pro se amended motion for new trial in which he made more specific allegations, including allegations of prosecutorial misconduct and ineffective assistance of counsel. Pieper also filed a pro se motion to dismiss counsel and appoint new counsel. The court sustained Pieper's motion for new counsel and appointed new counsel on May 12. On May 25, Pieper filed a third amended motion for new trial, asserting irregularities, misconduct, and ineffective assistance of counsel. Hearings were held, and on November 27, the court overruled the motion for new trial.

An enhancement hearing based on the habitual criminal allegation was held December 12, 2006. At the enhancement hearing, Pieper objected on the basis that "notwithstanding Nebraska Supreme Court precedent," enhancement pursuant to the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Cum. Supp. 2006), violated the Double Jeopardy Clauses of the Nebraska and federal Constitutions. The court overruled the objection and found Pieper to be a habitual criminal. The court sentenced Pieper to imprisonment for 10 to 20 years on each of the two convictions, with the sentences to be served consecutive to one another.

Pieper appeals.

## ASSIGNMENTS OF ERROR

Pieper asserts that the district court erred in (1) failing to grant his motion for new trial on the basis that the State failed to timely disclose to the defense Croghan's statement on February 22, 2006, that his testimony at trial would be consistent with his original statement to the police and contrary to his deposition,

(2) admitting tape recordings and transcriptions of the victims' statements into evidence without playing the tapes during trial and without restricting jury access to the tapes and transcriptions during deliberations, (3) failing to grant his motion for new trial on the basis that he received ineffective assistance of trial counsel, (4) failing to conclude that the habitual criminal statute violates the Double Jeopardy Clause, and (5) imposing excessive sentences.

## STANDARDS OF REVIEW

[1] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

[3] The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Archie, supra.*

[4] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *Id.*

## ANALYSIS

### *The District Court Did Not Err in Overruling Pieper's Motion for New Trial Because the Prosecution Did Not Have an Obligation to Disclose a Nonexculpatory Pretrial Conversation With a Witness.*

As his first assignment of error, Pieper asserts that the trial court erred when it overruled his motion for new trial in which he claimed that the State failed to timely disclose to the defense the officer's February 22, 2006, conversation with Croghan. We determine that the State had no obligation to disclose the conversation in this case and that therefore, the court did not abuse its discretion when it did not grant a new trial on such basis.

[5] We note initially that under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), due process requires the State to disclose exculpatory evidence to a defendant. See *State v. Lykens*, 271 Neb. 240, 710 N.W.2d 844 (2006). However, the State is not under a constitutional duty to disclose all information that might affect the jury's verdict, *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992), and discovery in a criminal case is, in the absence of a constitutional requirement, controlled by either a statute or a court rule, *id.* At issue here is Croghan's verbal statement to a police officer that he intended to testify in a manner unfavorable to Pieper. Such statement was not exculpatory to Pieper. Nevertheless, Pieper claims that the State had an obligation to disclose its knowledge regarding Croghan's intentions and that such obligation stemmed from discovery statutes and the court's discovery order. We determine that neither the statute nor the court's discovery order support Pieper's claim.

Pieper filed a motion for discovery on December 23, 2004. It did not specifically request the type of police witness inquiry at issue here. The court granted the motion in an order in which it stated, "Discovery is granted to all parties to [the] extent allowed by statute." Discovery statute Neb. Rev. Stat. § 29-1912 (Reissue 1995) controls our analysis. Section 29-1912 provides in part:

> (1) When a defendant is charged with a felony or when a defendant is charged with a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty, he or she may request the court where the case is to be tried, at any time after the filing of the indictment, information, or complaint to order the prosecuting attorney to permit the defendant to inspect and copy or photograph:
>
> (a) The defendant's statement, if any. . . .
>
> (b) The defendant's prior criminal record, if any;
>
> (c) The defendant's recorded testimony before a grand jury;
>
> (d) The names and addresses of witnesses on whose evidence the charge is based;

(e) The results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof; and

(f) Documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the prosecuting authority.

Pieper does not claim that the February 22, 2006, interview of Croghan fits any particular category listed in § 29-1912, although he does suggest knowledge of it would have been "useful" to the defense. Brief for appellant at 36. He further suggests that the reference to "information within the possession, custody, or control of the state" found in another discovery statute, Neb. Rev. Stat. § 29-1914 (Reissue 1995), expands the listings found in § 29-1912 to include "information" in general. We reject this argument. By its terms, § 29-1914 limits rather than expands the scope of discovery orders issued under § 29-1912 to "items or information within the possession, custody, or control of the state." Section 29-1914 does not add a new category, to wit "information," subject to discovery but instead serves to circumscribe the discovery obligation of the State. Given the discovery request and the court's discovery order in this case, which granted discovery to the extent allowed by statute, the State was not obligated to disclose its conversation with a witness in preparation for trial.

Pieper moved for a new trial on the additional basis that the State's providing the report of the February 22, 2006, conversation on the third day of trial was untimely. We conclude that the court did not abuse its discretion in overruling the new trial motion on such basis. With respect to the timeliness of the production of the officer's report, we note that the written report was not prepared until the second day of trial and that the State provided the report to the defense the next day, prior to Croghan's testimony at trial. After receiving the report, Pieper moved to dismiss and for a mistrial. When the motions were overruled, Pieper did not move for a continuance.

It is apparent from the record that prior to trial, Pieper was aware that Croghan had given conflicting accounts of the events at issue and that one version was more favorable than the other.

Given this knowledge of disparate versions, the possibility that Croghan's trial testimony could be consistent with his original statement was apparent to defense counsel.

We determine that given the discovery request, the discovery order, the discovery statutes, and Pieper's knowledge that Croghan had already given conflicting versions of events, the State was not obligated to provide to the defense its understanding of the officer's February 22, 2006, conversation with Croghan. We therefore conclude that the court did not abuse its discretion by overruling Pieper's motion for new trial on this basis.

*Pieper Did Not Object to the Admission of Tape Recordings and Transcriptions of the Victims' Statements to Police and Did Not Preserve the Issue for Appeal.*

As his second assignment of error, Pieper asserts that the court erred in admitting tape recordings and transcriptions of tape recordings of police interviews with the victims, French and A.N. We conclude that because Pieper failed to object to admission of these items, he has failed to preserve this issue for appeal.

A tape recording of a police interview with French and the transcription of a tape recording of another police interview with French were admitted into evidence. The tape recording was not played to the jury, and the transcription was not read to the jury. Although there is no indication in the record that the jury listened to the tape recording or read the transcription during deliberations, it appears that both pieces of evidence were available to the jury. For completeness, we note that in his appellate argument, Pieper also references a tape recording of a police interview of A.N. that was marked as an exhibit; however, there is no indication in the record that the A.N. tape recording was offered or admitted into evidence.

[6,7] A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an

issue never presented and submitted to it for disposition. *State v. Dockery*, 273 Neb. 330, 729 N.W.2d 320 (2007). Pieper did not object to the admission of the tape recording and the transcription and did not present the issue to the trial court. We therefore reject Pieper's second assignment of error.

*Claims of Ineffective Assistance of Counsel May Not Be Raised in a Motion for New Trial.*

As his third assignment of error, Pieper asserts that the court erred in overruling his motion for new trial in which, through substitute counsel, Pieper claimed his initial trial counsel had provided ineffective assistance. The State argues that ineffective assistance of counsel is not a proper statutory ground for a motion for new trial. We agree with the State and conclude that the court did not err in overruling the motion for new trial on such basis.

The statute governing motions for new trial, Neb. Rev. Stat. § 29-2101 (Cum. Supp. 2006), provides as follows:

> A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following grounds affecting materially his or her substantial rights: (1) Irregularity in the proceedings of the court, of the prosecuting attorney, or of the witnesses for the state or in any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial; (2) misconduct of the jury, of the prosecuting attorney, or of the witnesses for the state; (3) accident or surprise which ordinary prudence could not have guarded against; (4) the verdict is not sustained by sufficient evidence or is contrary to law; (5) newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial; (6) newly discovered exculpatory DNA or similar forensic testing evidence obtained under the DNA Testing Act; or (7) error of law occurring at the trial.

We note that ineffective assistance of counsel is not one of the enumerated grounds upon which a defendant may move for a new trial under § 29-2101.

[8] Pieper argues on appeal that the procedure of raising claims of ineffective assistance of counsel in a motion for new trial was "allowed" by this court in earlier cases and should be permitted in the instant case. Reply brief for appellant at 3. Pieper cites *Hawk v. Olson*, 146 Neb. 875, 22 N.W.2d 136 (1946), and *State v. Whiteley*, 234 Neb. 693, 452 N.W.2d 290 (1990). In *Hawk*, this court held that due process issues, including a claim that the defendant had been deprived of effective assistance of counsel, were "issues which are not justiciable in a habeas corpus proceeding in this state." 146 Neb. at 881, 22 N.W.2d at 140. In reaching such conclusion, this court stated in dicta that the issues "could have been presented and determined by the trial court, in the first instance, on a motion for a new trial." *Id.* In *Whiteley*, this court held that the trial court did not abuse its discretion in overruling a motion for new trial which raised issues of ineffective assistance of counsel. However, this court did not, in either *Hawk* or *Whiteley*, cite to § 29-2101 or analyze the propriety or prudence of raising a claim of ineffective assistance in a motion for new trial made under § 29-2101. Because we conclude that ineffective assistance of counsel is not a ground upon which a defendant may move for new trial under § 29-2101, to the extent that *Hawk* and *Whiteley* imply that an ineffective counsel claim can be raised on a motion for new trial, they are disapproved.

We believe that in addition to the fact that a claim of ineffective counsel is not an enumerated basis for a new trial motion under § 29-2101, such claim is not suited to a motion for new trial. Due to the absence of a record relating to issues such as defense counsel's trial strategy, a separate evidentiary hearing would be required on the ineffectiveness claim, thus postponing entry of judgment. A defendant exploring ineffectiveness of trial counsel immediately after the trial could run the risk of a procedural bar if not all ineffectiveness claims were raised and developed. Defendants are not without remedies. Claims of ineffective assistance of counsel are available on direct appeal and in postconviction proceedings. See, *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007); Neb. Rev. Stat. § 29-3001 (Reissue 1995). However, they are neither authorized nor suited to the immediate aftermath of a trial in a motion for new trial.

Because ineffective assistance of counsel is not a proper ground for a motion for new trial under § 29-2101, we conclude that the court did not abuse its discretion by overruling the motion for new trial on such basis.

*Nebraska's Habitual Criminal Statute Does Not Violate the Double Jeopardy Clause.*

As his fourth assignment of error, Pieper asserts that the court erred in rejecting his assertion that the habitual criminal statute, § 29-2221, violates the Double Jeopardy Clauses of the federal and Nebraska Constitutions. We conclude that the court did not err in rejecting such assertion.

[9] In raising the constitutional challenge to the habitual criminal statute at the enhancement hearing, Pieper's counsel acknowledged that the challenge was made "notwithstanding Nebraska Supreme Court precedent stating double jeopardy principles do not apply." This court has previously rejected double jeopardy challenges to Nebraska's habitual criminal statute and has long held that the statute does not violate the Double Jeopardy Clause because "an enhanced sentence under the provisions of the habitual criminal laws is not a new jeopardy or additional penalty for the same crime. It is simply a stiffened penalty for the latest crime which is considered to be an aggravated offense because it is a repetitive one." *Addison v. Parratt*, 208 Neb. 459, 462, 303 N.W.2d 785, 787 (1981). See, also, *State v. Goodloe*, 197 Neb. 632, 250 N.W.2d 606 (1977), *disapproved on other grounds, State v. Clifford*, 204 Neb. 41, 281 N.W.2d 223 (1979).

Pieper makes no new argument that would cause us to reconsider such precedent. The district court therefore did not err in rejecting Pieper's constitutional challenge to the habitual criminal statute.

*District Court Did Not Impose Excessive Sentences.*

As his final assignment of error, Pieper asserts that the court imposed excessive sentences. The sentences were within statutory limits, and we conclude that the court did not abuse its discretion in the sentences it imposed.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). Pieper was convicted of first degree assault under Neb. Rev. Stat. § 28-308 (Reissue 1995) and false imprisonment in the first degree under Neb. Rev. Stat. § 28-314 (Cum. Supp. 2006). First degree assault is a Class III felony, § 28-308(2), and false imprisonment is a Class IIIA felony, § 28-314(2). The maximum sentence of imprisonment is 20 years for a Class III felony and 5 years for a Class IIIA felony. Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2006). However, due to prior felony convictions, Pieper was found to be a habitual criminal, and under § 29-2221, one found to be a habitual criminal is to be punished by imprisonment for a mandatory minimum term of 10 years and a maximum term of not more than 60 years for each felony conviction. Pieper was sentenced to imprisonment for 10 to 20 years on each count with the sentences to be served consecutive to one another. Therefore, Pieper's sentences were within statutory limits.

Pieper's main argument is that the court erroneously ordered that his sentences be served consecutive to one another because the court mistakenly thought it was required to do so. Pieper notes that when defense counsel urged that the sentences be ordered to be served concurrently, the court stated, "while some might think that I have a lot of discretion in this matter, I really don't think I do." We do not read the court's comments to indicate that the court thought it was mandatory that the sentences be served consecutive to one another. The court continued by stating, "while it would be tempting to make the sentences concurrent, because they do arise perhaps out of the same event, what I have are two separate victims and really two very separate crimes, at least as the jury determined them." The court then "decline[d] that invitation" to order the sentences to be served concurrently. We read the court's comments to indicate that the court knew it had discretion to order the sentences to be served concurrently but decided that consecutive sentences were appropriate under the circumstances.

Although Pieper argues that he did not have a history of violence, we note that Pieper had a significant criminal history, including felony convictions for burglary and theft. We also

note that the victims in this case suffered severe physical and emotional injuries as a result of the crimes and that French's injuries in particular were life threatening. We finally note that the sentences were at the lower end of the range mandated by the habitual criminal statute. We therefore conclude that the court did not abuse its discretion in imposing consecutive sentences of 10 to 20 years' imprisonment on each count.

## CONCLUSION

Having considered and rejected each of Pieper's assignments of error, we affirm his convictions and sentences for first degree assault and false imprisonment in the first degree.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
JESSICA M. REID, APPELLANT.
743 N.W.2d 370

Filed January 4, 2008. No. S-07-303.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
4. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
5. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Thomas J. Olsen, of Troia & Olsen, for appellant.

Jon Bruning, Attorney General, George R. Love, and Andy Maca, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Under a plea agreement, Jessica M. Reid pled guilty to two counts of second degree murder for the deaths of Wayne and Sharmon Stock. The district court sentenced Reid to not less than life imprisonment nor more than life imprisonment for each murder. The court ordered Reid to serve the sentences consecutively. Reid appeals, assigning that her sentences are excessive. We affirm.

## BACKGROUND

Before embarking on this crime spree, Reid and her codefendant and boyfriend, Gregory D. Fester II, were living together in Horicon, Wisconsin. On April 15, 2006, they left Wisconsin. After stealing and abandoning two vehicles, they stole money, a 12 gauge shotgun, ammunition, and another vehicle from a Wisconsin home. They then drove to Iowa, planning to rob a few houses on their way to Arizona. They broke into two more houses in Iowa. They vandalized the first house and stole a .410 shotgun and ammunition and stole about $300 from the second house. Later that night, they decided to burglarize the Stocks' rural home in Cass County, Nebraska.

Fester entered the first floor through a window and opened a door for Reid. Fester carried the 12 gauge shotgun, and Reid carried the .410 shotgun. Reid stated to law enforcement that they did not stay on the first floor long before heading upstairs. She heard snoring coming from upstairs and removed her coat so she would not make any noise. She then followed Fester upstairs. According to Reid's account, Fester turned on the Stocks' bedroom light and then came back into the hallway and asked her what to do. She replied, "do something." Fester then ran back into the room and shot Wayne Stock in the leg while he was in bed or getting out of bed. Wayne Stock then struggled with Fester over the 12 gauge shotgun. While they were struggling, Reid shot Wayne Stock with the .410 shotgun.

She stated that Wayne Stock looked her directly in the eyes and that she then pulled the trigger. She further stated she shot Wayne Stock above his right eye and he fell forward. After Wayne Stock fell, Fester jumped over his body and shot him in the back of the head with the 12 gauge shotgun and then shot Sharmon Stock in the face. According to Reid, she and Fester immediately ran from the house and left in the stolen vehicle, which they later abandoned.

On April 23 and 24, 2006, police arrested Fester and Reid in Wisconsin for vehicle theft. Reid had left an inscribed ring in the Stocks' home that she and Fester had earlier stolen from the Wisconsin vehicle or home. The ring ultimately connected Reid and Fester to the murders.

During the investigation, law enforcement officers recovered evidence from Reid's home. On April 22, 2006, 5 days after the murders, Reid wrote in her journal: "I killed someone. He was older. I loved it. I wish I could do it all the time. If [Fester] doesn't watch it I am going to just leave one day and go do it myself." Also, at some point while Fester was in jail, Reid wrote a letter to him and left it at the home, apparently for him to retrieve after authorities released Fester on the Wisconsin charges. The letter was left in a cigarette box, which also contained a spent 12 gauge shell casing from the murders. In the letter, she wrote: "And this bullet well bunny it's the only thing left. And I loved it, but that's something we will talk about one day. But it's here also bcuz [sic] that was something I did for you, me and for you to love me as much as I love you."

On June 10, 2006, a Wisconsin detective interviewed Reid about the murders. During the interview, Reid denied that she shot Sharmon Stock but admitted that she shot Wayne Stock. On August 28, the State filed an information charging Reid with two counts of first degree murder in the Stocks' deaths. In exchange for her guilty pleas and agreement to testify against Fester, the State agreed to amend the information to two counts of second degree murder.

## ASSIGNMENT OF ERROR

Reid assigns that the district court abused its discretion by imposing excessive sentences.

## STANDARD OF REVIEW

[1,2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[1] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[2]

## ANALYSIS

Reid was convicted of two counts of second degree murder, a Class 1B felony.[3] Second degree murder is punishable by a minimum of 20 years' imprisonment and a maximum of life imprisonment.[4] Thus, the district court's sentences were within the statutory limits.

Reid, however, contends that the district court abused its discretion because she did not have a history of serious criminal conduct and because Fester committed the two murders. She argues that her culpability for the murders was much less than Fester's, yet she was not given any credit for cooperating with law enforcement or for making statements that exonerated two other suspects. Finally, she argues that although the district court emphasized her letter to Fester and journal entry, she has since changed and shown great remorse over her involvement in the murders.

[3-5] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[5] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.[6] The appropriateness

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[1] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[2] *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

[3] Neb. Rev. Stat. § 28-304 (Reissue 1995).

[4] Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006).

[5] See *Archie, supra* note 1.

[6] *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[7]

The presentence report revealed that Reid was 17 years old at the time the Stocks were murdered and had dropped out of school in the 10th grade. She had been an honor roll student before her mother and stepfather separated when she was about 13. Over the next 2 years, she attended several new schools. She began using drugs and staying away from home for extended periods and missing a substantial amount of school. In 2004, she was placed on juvenile probation for theft. The Wisconsin Department of Social Services placed her in detention twice for parole violations. Because of the violations, authorities placed her in the juvenile intensive sanctions program. Between June 2005 and February 2006, authorities placed her in custody six times for violations of the program, including theft, criminal damage to property, and possession of drug paraphernalia. She did not comply with drug and alcohol treatment services or pay restitution. Her juvenile caseworker described her as "extremely dishonest when dealing with anybody in authority" and intent on disregarding restrictions and sanctions. After she was extradited to Nebraska, Wisconsin dismissed pending felony charges against her. A probation officer assessed she was a high risk for rearrest.

At the sentencing hearing, the court recognized that Reid was 17 when the murders were committed. It found that she was of "normal to above average intelligence" but had dropped out of school because of drug use and her involvement with "the wrong crowd." It further found that her history of drug use was a contributing factor in the crime. Finally, the court recognized that her trouble with the law began around the time that her mother and stepfather divorced. But the court concluded that her role in the Stocks' deaths was significant. The court stated that if Reid had not intervened when Wayne Stock was struggling with Fester over the gun, it was possible neither death would have occurred. Reid's journal and letter troubled the court. The court concluded:

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[7] *Id.*

> The offenses involved here were brutal, senseless crimes. By all accounts, the victims were wonderful people, respected by members of their community and church and loved very much by their family. They experienced fear and horror which is hard to imagine. They were brutally murdered in the sanctity of their own bedroom, their own home.
>
> . . . It's hard, in this case, to consider anything less than life sentences.

We agree. We have reviewed Reid's statements to law enforcement regarding the murders. Contrary to Reid's arguments on appeal, the record shows that in police interviews, Reid specifically stated that she knew she had shot Wayne Stock directly above his right eye with the .410 shotgun and that she believed she had killed him before Fester shot him. Her initial statements to law enforcement about her role in shooting Wayne Stock were made to rebut the suspicion that she had shot Sharmon Stock. Many of her later statements that she might have missed while shooting at Wayne Stock were a smokescreen to minimize her role in the murders. Similarly, the statements that she claims helped to exonerate two other suspects were made after she had implicated the suspects. Apparently, the statements were motivated in part by her desire to show that she had not participated in a planned, hired killing. Finally, we believe her journal entry is the most compelling evidence of her culpability and callousness. It keeps whispering, "I killed someone. . . . I loved it. I wish I could do it all the time." As we stated in *State v. Fester*,[8] "[w]ithout provocation or justification, two innocent people were callously murdered in the solitude and sanctity of their own home. Any lesser sentence under these circumstances, even when considering the mitigating factors . . . would diminish the seriousness of this crime and promote disrespect for the law."

## CONCLUSION

The district court did not err in sentencing Reid to two consecutive life sentences. The judgment of the court is affirmed.

AFFIRMED.

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[8] *State v. Fester, post* p. 786, 789-90, 743 N.W.2d 380, 383 (2007).

STATE OF NEBRASKA, APPELLEE, V.
GREGORY D. FESTER II, APPELLANT.
743 N.W.2d 380

Filed January 4, 2008. No. S-07-336.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
3. ____. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
4. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all facts and circumstances surrounding the crime and the defendant's life.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Alan G. Stoler, of Law Office of Alan G. Stoler, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, George R. Love, and Andy Maca, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

## NATURE OF CASE

Gregory D. Fester II pled guilty to two counts of second degree murder and one count of use of a firearm in the commission of a felony in the April 17, 2006, deaths of Wayne and Sharmon Stock in Murdock, Nebraska. Fester was sentenced to a term of not less than life imprisonment nor more than life imprisonment for each count of murder in the second degree, and a term of 10 to 20 years' imprisonment for use of a firearm to commit a felony. The sentences were to be served consecutively. Fester claims the sentences were excessive. For the following reasons, we affirm the judgment of the district court.

## STATEMENT OF FACTS

Fester lived with his girlfriend, Jessica Reid, in Horicon, Wisconsin. Fester and Reid left their apartment in Wisconsin on April 15, 2006, and arrived in Nebraska on April 17. Along the way, Fester and Reid participated in a crime spree that involved, among other things, stealing two cars and burning another, breaking into several homes, and stealing a 12 gauge shotgun and ammunition.

On the night of April 17, 2006, Fester and Reid arrived in Murdock, Nebraska, and, armed with a 12 gauge shotgun and a .410 shotgun, broke into the home of the Stocks with the intent to burglarize the home. The Stocks' home had been randomly selected. After entering the house, Fester heard snoring coming from upstairs. Fester and Reid went up the stairs toward the Stocks' bedroom.

It is not entirely clear what happened when Fester and Reid reached the Stocks' bedroom. But according to the uncontested recitation of the facts offered by the State at the sentencing hearing, Wayne Stock attempted to confront Fester and Reid, and Fester fired a shot that hit Wayne Stock in the knee. A struggle ensued between Fester and Wayne Stock. Apparently, while Fester and Wayne Stock were allegedly fighting over the weapon, Fester told Reid to "do something," and Reid fired her .410 shotgun in the direction of Wayne Stock. Fester then shot Wayne Stock in the back of the head with his shotgun, killing him. Then, Fester entered the bedroom and shot Sharmon Stock in the face, killing her.

Pursuant to a plea agreement, Fester was eventually charged in an amended information with two counts of murder in the second degree[1] and one count of use of a firearm in the commission of a felony.[2] Fester pled guilty to all three counts of the amended information.

The presentence investigation report revealed that Fester was 19 years of age at the time the Stocks were killed and that at the time of sentencing, he had a 2-year-old child. Fester had a lengthy history of substance abuse, including the use of alcohol,

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[1] See Neb. Rev. Stat. § 28-304 (Reissue 1995).

[2] See Neb. Rev. Stat. § 28-1205 (Reissue 1995).

marijuana, cocaine, heroin, and dextromethorphan. Fester also has an extensive history of criminal activity. Fester's prior criminal activity included, among other things, trespass to land, shoplifting, disorderly conduct, theft from a motor vehicle, criminal damage to property, and sexual assault. The presentence investigation report also revealed that during Fester's life, he had been under various degrees of psychiatric care and had taken a variety of psychotropic medications.

Following a sentencing hearing, the district court sentenced Fester to a term of not less than life imprisonment nor more than life imprisonment for each count of murder in the second degree and a term of 10 to 20 years' imprisonment for use of a firearm to commit a felony. The sentences were to be served consecutively. Fester appealed.

## ASSIGNMENT OF ERROR

Fester assigns, consolidated and restated, that the district court erred in imposing excessive sentences.

## STANDARD OF REVIEW

[1] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[3]

## ANALYSIS

Fester was convicted of two counts of second degree murder and one count of use of a firearm to commit a felony. Second degree murder is a Class IB felony,[4] punishable by a minimum of 20 years' imprisonment and a maximum of life imprisonment.[5] Use of a deadly weapon which is a firearm to commit a felony is a Class II felony[6] and is punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment.[7] The sentences imposed on Fester were within the statutory limits.

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[3] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[4] § 28-304.

[5] Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006).

[6] § 28-1205.

[7] § 28-105.

Fester nonetheless argues that his sentences were excessive. Fester contends that the district court failed to properly consider, as a mitigating factor, his acceptance of responsibility for the crime and his admission of guilt. Fester also claims that the court erred in failing to adequately weigh certain mitigating circumstances including his age, his history of mental illness, his use of drugs before the commission of the crime, and the fact that he has a 2-year-old child.

[2-4] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[8] We have further held that, in considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. Obviously, depending on the circumstances of a particular case, not all factors are placed on a scale and weighed in equal proportion. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all facts and circumstances surrounding the crime and the defendant's life.[9]

The presentence investigation report reveals that Fester has an extensive criminal record, a significant history of drug use and distribution, and a history of violence. The record also plainly establishes that the killing of the Stocks was depraved, violent, and senseless. In discussing the killings, Fester admitted to the presentence investigative probation officer that he and Reid "'really didn't need any money, we were just there for the thrill I guess.'"

At sentencing, the district court considered both the mitigating and aggravating factors and explained that Fester's "possibility of rehabilitation is remote and is far outweighed in this case by the necessity and need for the protection of society." We agree. Without provocation or justification, two innocent

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[8] *State v. Archie, supra* note 3.

[9] See *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

people were callously murdered in the solitude and sanctity of their own home. Any lesser sentence under these circumstances, even when considering the mitigating factors urged by Fester, would diminish the seriousness of this crime and promote disrespect for the law.

## CONCLUSION

We have reviewed the record and considered Fester's arguments. Based on our review of the record, and the foregoing reasoning, we conclude that the district court did not abuse its discretion in sentencing Fester. The judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLANT, V.
TERRENCE D. MOORE, APPELLEE.
743 N.W.2d 375

Filed January 4, 2008. No. S-07-370.

1. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Sentences: Appeal and Error.** When the State challenges a sentence as excessively lenient, the appellate court should consider (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed (a) to afford adequate deterrence to criminal conduct, (b) to protect the public from further crimes of the defendant, (c) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (4) any other matters appearing in the record which the appellate court deems pertinent.
4. **Sentences.** A sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the

defendant's life. But there also must be some reasonable factual basis for imposing a particular sentence.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Sentences vacated, and cause remanded with directions.

Donald W. Kleine, Douglas County Attorney, and Jennifer Meckna for appellant.

Thomas C. Riley, Douglas County Public Defender, and Scott C. Sladek for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

## NATURE OF CASE

Terrence D. Moore pled guilty to two counts of second degree murder and two counts of use of a firearm to commit a felony. The district court for Douglas County sentenced Moore to imprisonment for 30 to 45 years on each count of second degree murder and for 10 to 10 years on each firearm count. The two sentences for second degree murder were ordered to be served concurrently to one another, and the two sentences for the firearm counts were ordered to be served consecutively to one another and to the sentences for second degree murder. The State appeals Moore's sentences as being excessively lenient. We conclude that Moore's sentences were excessively lenient, and we therefore vacate Moore's sentences and remand the cause with directions for resentencing by a different judge.

## STATEMENT OF FACTS

In the early morning hours of February 25, 2005, Moore went to the apartment of Terry Jasper and Diane Caveye. Moore was angry over events that had occurred the previous day. According to Moore, Jasper had "punked" him by failing to pay approximately $30 that he owed Moore for drugs. When Moore went to Jasper and Caveye's apartment, Moore was armed with a 9mm-handgun. Jasper's nephew, Jackie Payne, was present at the apartment when Moore arrived.

An argument ensued between Moore and Jasper. At one point, Moore and Payne went into the bathroom to talk. Moore told Payne he was angry with Jasper because Jasper owed Moore money and had left Moore waiting at an arranged meeting place the prior day. Moore showed Payne his gun and told Payne he felt like "unloading" the gun. Payne thought that Moore had calmed down after they talked in the bathroom; however, shortly after exiting the bathroom, Moore shot Jasper three times. Jasper was sitting in a chair when Moore fired the first two shots, and Moore fired the third shot into Jasper's back after he fell to the ground. Caveye was lying on a couch with a blanket over herself. After shooting Jasper, Moore shot Caveye three times. Payne was present and witnessed the shootings. Jasper and Caveye died from the gunshot wounds.

Moore fled the scene after shooting Jasper and Caveye. Moore was arrested on March 9, 2005, and confessed to the shootings. He said that he was angry with Jasper because Jasper had "punked" him, that he shot Jasper because he was scared, and that after firing the first two shots at Jasper, he fired the third shot because he was afraid Jasper would identify Moore as the perpetrator. Moore said that he shot Caveye because he was scared that if he did not she would tell someone that he had shot Jasper. Moore was originally charged with two counts of first degree murder and two counts of use of a firearm to commit a felony. Pursuant to a plea agreement, Moore pled guilty to two counts of second degree murder and two counts of use of a firearm to commit a felony.

Moore was originally sentenced on May 23, 2006. Moore appealed to this court on the basis that the written order of commitment contained sentencing terms inconsistent with the sentence imposed by the court's oral pronouncement. Without reaching Moore's assigned error, this court, in a memorandum opinion dated January 4, 2007, vacated the sentences and remanded the cause for resentencing on the basis that the district court had erred as a matter of law when it ordered that the sentence for at least one of the firearm counts be served concurrently to one of the sentences for second degree murder. Under Neb. Rev. Stat. § 28-1205(3) (Reissue 1995), a sentence

for use of a weapon must be served consecutive to any other sentence imposed.

Upon remand, Moore was resentenced, and the new sentence gives rise to this appeal. On March 20, 2007, the district court sentenced Moore to imprisonment for 30 to 45 years on each count of second degree murder and for 10 to 10 years on each firearm count. The two sentences for second degree murder were ordered to be served concurrently to one another, and the two sentences for the firearm counts were ordered to be served consecutively to one another and to each of the sentences for second degree murder.

The State requested and received the Attorney General's approval to appeal the sentences as excessively lenient pursuant to Neb. Rev. Stat. §§ 29-2320 and 29-2321 (Cum. Supp. 2006).

## ASSIGNMENT OF ERROR

The State claims that the district court abused its discretion by imposing excessively lenient sentences.

## STANDARDS OF REVIEW

[1,2] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

## ANALYSIS

Pursuant to a plea agreement, Moore was convicted of two counts of second degree murder and two counts of use of a firearm to commit a felony. Second degree murder is a Class IB felony, punishable by imprisonment for 20 years to life. Neb. Rev. Stat. §§ 28-304(2) (Reissue 1995) and 28-105 (Cum. Supp. 2006). Use of a firearm to commit a felony is a Class II felony, punishable by imprisonment for 1 to 50 years. §§ 28-1205(2)(b) and 28-105. Section 28-1205(3) provides that the sentence imposed for use of a firearm to commit a felony

"shall be consecutive to any other sentence imposed." Although Moore's sentences were within statutory limits, we determine that the trial court abused its discretion by imposing excessively lenient sentences.

[3,4] When the State challenges a sentence as excessively lenient, the appellate court should consider:

> (1) The nature and circumstances of the offense;
>
> (2) The history and characteristics of the defendant;
>
> (3) The need for the sentence imposed:
>
> (a) To afford adequate deterrence to criminal conduct;
>
> (b) To protect the public from further crimes of the defendant;
>
> (c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and
>
> (4) Any other matters appearing in the record which the appellate court deems pertinent.

Neb. Rev. Stat. § 29-2322 (Reissue 1995). Accord *State v. Rice, supra*. A sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Rice, supra*. But there also must be some reasonable factual basis for imposing a particular sentence. *Id.*

Moore killed one person because he was angry over an unpaid drug debt of approximately $30 and killed a second person in order to prevent her from being a witness to the first killing. We note that Moore's guilty plea resulted from an agreement which reduced the homicide charges to second degree murder from the original charges of first degree murder, a Class IA felony punishable by imprisonment for life without parole, or a Class I felony punishable by death. Neb. Rev. Stat. § 28-303 (Cum. Supp. 2006) and § 28-105. Moore admitted that he killed both Jasper and Caveye in the same incident and that he shot

Caveye in order to prevent her from telling anyone that he had shot Jasper. Were this a first degree murder case, we note that under Neb. Rev. Stat. § 29-2523 (Cum. Supp. 2006), among the aggravating circumstances that would make a defendant eligible for the death penalty are that "[a]t the time the murder was committed, the offender also committed another murder" and that the "murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime." Because two circumstances were present in this case which are comparable to first degree aggravators, it is clear that Moore's crimes were of the type that the Legislature has deemed to be the most serious in this state. We agree.

Moore points to his lack of an extensive history of criminal violence, his clear expression of remorse, and his lack of chemical or alcohol dependency issues as factors indicating that his sentences were not excessively lenient. Although Moore's criminal history is arguably not "extensive," it is significant and includes a drug conviction and an assault conviction and indicates an increasing involvement in criminal activity.

We note that Moore was shown a degree of leniency by the State when it entered into a plea agreement under which the homicide charges were reduced from first to second degree murder and that Moore was thereby spared the possibility of sentences of either life without parole or death. The crimes in this case were of the type deemed to be the most serious in this state, and the mitigating factors noted by Moore are not sufficient to justify the lenience granted by the trial court in imposing sentences that were at the lower end of the range of possible sentences and in ordering the sentences for the two murder charges be served concurrently to one another. We conclude that considering the facts and the nature of the offenses committed by Moore, the sentences given in this case do not adequately reflect the seriousness of the offenses, do not promote respect for the law, and do not provide just punishment.

## CONCLUSION

Considering the very serious nature of the offenses committed by Moore, we conclude that the district court abused its discretion by imposing excessively lenient sentences. In this

circumstance, Neb. Rev. Stat. § 29-2323 (Reissue 1995) permits an appellate court to set aside the sentence and either (1) remand the cause for imposition of a greater sentence, (2) remand the cause for further sentencing proceedings, or (3) impose a greater sentence. We deem the first option to be appropriate in this case and, therefore, vacate the sentences and remand the cause to the district court with instructions to impose greater sentences. The sentences should be imposed by a different district court judge than the original sentencing judge. See *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

SENTENCES VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

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LARRY COFFEY, APPELLANT AND CROSS-APPELLEE, V. COUNTY OF OTOE, NEBRASKA, AND THE BOARD OF ADJUSTMENT OF OTOE COUNTY, NEBRASKA, APPELLEES AND CROSS-APPELLANTS, AND KENT AND SUE KREIFELS, INTERVENORS-APPELLEES AND CROSS-APPELLANTS.

743 N.W.2d 632

Filed January 11, 2008. No. S-06-921.

1. **Constitutional Law: Statutes: Ordinances.** The constitutionality of a statute or an ordinance is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
3. **Zoning: Ordinances: Presumptions: Proof.** The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.
4. **Constitutional Law: Proof.** The burden of demonstrating the constitutional defect rests with the challenger.
5. **Municipal Corporations: Ordinances: Zoning: Proof.** To successfully challenge the validity of a zoning ordinance, the party challenging must prove that the conditions imposed by the city in adopting the zoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose sought to be accomplished by the ordinance.
6. **Constitutional Law: Property: Statutes: Ordinances: Waiver.** If the action of a property owner has the effect of legislation in that the action creates the restriction or prohibition, then the ordinance or statute constitutes an unlawful delegation of legislative authority. But, if the consent is used for no other purpose than to waive or modify a restriction which the governing body has lawfully created and

has provided for such a waiver or modification by those most affected, then the consent is regarded as being within constitutional limitations.

7. **Due Process: Waiver.** In order for a legislative delegation to private citizens to survive a due process challenge, two criteria must be satisfied. First, the underlying exercise of authority must be a reasonable regulation within the power of the government. Second, the governing body's restriction must be in the form of a general prohibition, and the delegation must be in the form of permitting private citizens to waive the protection of that prohibition.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Reversed and remanded with directions.

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellant.

Jeffrey J. Funke, Otoe County Attorney, and David J. Partsch, for appellees County of Otoe and Board of Adjustment of Otoe County.

Joseph F. Bachmann and Shawn P. Dontigney, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellees Kent and Sue Kreifels.

HEAVICAN, C.J., WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

## NATURE OF CASE

Otoe County enacted a zoning regulation that prohibits, among other things, the construction of single-family dwellings within a one-half-mile radius of certain animal feeding and waste handling facilities, unless the owner of the single-family dwelling grants an impact easement to the owner of the facility and the owner of the facility agrees to the easement. The primary issue presented in this appeal is whether the regulation, requiring that the granting of the easement be "mutual," constitutes an unauthorized delegation of legislative authority to private citizens.

## STATEMENT OF FACTS

Kent Kreifels began operating a hog confinement facility on his property in Otoe County, Nebraska, in 1990. As part of

his hog confinement operation, Kreifels disposes of the waste produced by the pigs by spreading the waste on various parts of his property. On the occasions when the waste is spread upon Kreifels' property, the dust, noise, and odor can be bothersome for neighboring property owners.

Beginning in March 2000, Otoe County held several public meetings to discuss and consider regulations for a comprehensive zoning plan for the county. In April 2001, before the zoning regulations had been adopted, Larry Coffey purchased approximately 195 acres of land adjacent to the land owned by Kreifels in Otoe County. At the time Coffey purchased the land, it was zoned as agricultural. It was Coffey's intent to divide the land into smaller parcels and sell the lots for residential development. The comprehensive zoning plan and regulations were adopted by the county on April 9, 2002, and were later amended on September 23, 2003. For purposes of this case, the amendments made to the regulations in 2003 are not substantive and thus, we will use this current version.

Under the new zoning regulations, both Kreifels' and Coffey's properties are located in the "General Agricultural District." The following regulations, designed to promote and facilitate agriculture, are relevant to this case:

> **501.01 INTENT:** The intent of [the general agricultural] district is to promote and facilitate agricultural crop production, livestock production, which is in balance with the natural environment, and other and new forms of agricultural production which are compatible with existing agricultural uses and the environmental limitations of the County. The intent is also to encourage soil and water conservation, to prevent contamination of the natural environment within the County and to preserve and protect land best suited for agricultural uses by preventing or regulating the introduction, encroachment and location of commercial uses, industrial uses and other non-agricultural uses, including non-farm residential uses, which would be or could become incompatible with the agricultural character and occasional generation of dust, odors, and other similar events produced agricultural uses, or which could result in contamination of the air, soils and

water, or which could negatively impact the use, value and enjoyment of property, and the culture and way of life in Otoe County.

. . . .

**501.03 PERMITTED PRINCIPAL USES AND STRUCTURES:** The following uses and structures shall be permitted uses, but shall require the issuance of a zoning / building permit and / or certificate of zoning compliance:

. . . .

9. Single-Family dwellings . . . provided such dwellings comply with all of the following conditions.

A. Such dwellings, if not on the same lot with and not of the same ownership as any existing confined animal feeding use . . . shall be separated from such use by the minimum distance specified in Table 501.05, MINIMUM SEPARATION DISTANCES FOR CONFINED AND INTENSIVE ANIMAL FEEDING USES for the size of the animal feeding use and the type of waste handling facility in existence, provided that if one or more impact easement(s), as defined in Section 303.53 of this Resolution, is/are granted by the owner of the dwelling unit to the owner of a confined or intensive animal feeding use or waste handling facility, any dwelling unit(s) associated with the land on which any such easement has been granted shall not be included in the minimum distance measurements herein specified.

Pursuant to table 501.05, the required minimum distance in this case between Kreifels' operation and a neighboring residence would be one-half mile. The record establishes that of the 195 acres of land owned by Coffey, approximately 192 acres fall within one-half mile of Kreifels' hog confinement operation.

Section 303.53 defines an "Impact Easement" as

> [a]n easement or deed restriction, recorded in the office of the Otoe County Registrar of Deeds, which runs with the land, which is granted to the owner of an industrial use, a confined or intensive animal feeding use, a waste handling facility use or other use for the period of time that such use shall exist, by the owners of adjoining or neighboring real property in which it is *mutually agreed* that the

> grantor shall hold the grantee harmless from odor, smoke, dust, or other legal impacts associated with such use on the grantor's property when such use is operated in accordance with the terms of such easement or deed restriction. [(Emphasis supplied.)]

After the zoning regulations had been adopted, Coffey had his property surveyed. On August 29, 2002, Coffey filed with the Otoe County register of deeds a subdivision plat dividing his property into five tracts. On March 4, 2003, the zoning administrator for Otoe County sent Coffey's real estate agent a copy of the Otoe County zoning regulations and informed the agent that an impact easement would be needed from Kreifels before a building permit could be issued for Coffey's lots.

In October 2004, Coffey entered into an agreement to sell one of his parcels of land to Ray and Connie O'Connor. In the agreement, the O'Connors acknowledged the presence of Kreifels' hog confinement facility and the need to obtain an impact easement. The agreement also provided that the sale of the land was subject to the acquisition of a building permit. On December 2, Coffey, through his attorney, prepared an impact easement and sent it to Kreifels. The impact easement was attached to a letter requesting that Kreifels sign the impact easement and return it to Coffey's attorney within 7 days. Kreifels did not sign or return the impact easement.

Without having acquired an impact easement, the O'Connors requested a building permit. On December 30, 2004, the zoning administrator sent a letter to the O'Connors, explaining that pursuant to the zoning regulations, the zoning administrator could not issue a building permit within one-half mile of where Kreifels deposits liquid manure products unless the O'Connors obtained an impact easement signed by Kreifels.

Coffey then filed an application for a conditional use permit with the Otoe County Planning Commission to allow residential construction on his property. Following a hearing, the Otoe County Planning Commission denied Coffey's request on February 17, 2005. Coffey then applied to the Otoe County Board of Adjustment for a variance from the application of the zoning regulations. On April 21, the Otoe County Board of

Adjustment denied Coffey's request for a variance. The present action was then filed in the district court for Otoe County.

In his complaint, Coffey appealed the Otoe County Board of Adjustment's denial of his request for a variance. Coffey also sought declaratory and injunctive relief, claiming, among other things, that § 501.03, subsection (9)(A), and § 303.52 (now § 303.53 with the 2003 amendments) of the zoning regulations are unlawful because these sections constitute "an unlawful delegation of the county's governmental regulatory power to private individuals." Kreifels and his wife filed a motion to intervene, which was granted.

There was testimony presented at trial that Kreifels' hog confinement operation attracts a large number of flies and also generates odor, noise, and dust. Kreifels explained that, among other things, he is concerned that if he signed the easement and continued to operate his hog confinement facility, he would continually be involved in litigation regarding the validity of the easement and in potential future litigation relating to the health of the property owners within a one-half-mile radius.

The evidence presented at trial also indicated that although Kreifels refused to sign Coffey's impact easement, Kreifels had signed two impact easements in the past for other property owners whose land was adjacent to his. Kreifels testified, however, that he signed the prior impact easements because, at the time, it was his understanding that he was required to do so.

Following a bench trial, the district court affirmed the denial of Coffey's request for a variance, concluding that Coffey had failed to show that the decision of the Board of Adjustment was not supported by the evidence, or was arbitrary and unreasonable, or clearly wrong. The court also determined that the portion of § 501.03(9)(A) of the zoning regulations which provided for a mutual impact easement exception to the one-half-mile building prohibition was an unlawful delegation of the county's legislative authority and a violation of Coffey's rights to due process and equal protection of the law.

However, the court found that while the "impact easement" exception in § 501.03(9)(A) was invalid, the remainder of § 501.03(9)(A), as well as the other provisions in the zoning regulations, are still enforceable. The court explained

that "[s]triking the 'impact easement' exception portion of § 501.03(9)(A) results in the first part of § 501.03(9)(A) remaining intact, meaning that a building [sic] is strictly prohibited from building residential dwellings within the [one-half-]mile halo, the minimum distance requirement set in Table 501.05 of the Otoe County [z]oning [r]egulations."

Coffey filed a motion for new trial, which was overruled. Coffey appeals, and Otoe County and the Otoe County Board of Adjustment (hereinafter collectively Otoe County) and the Kreifelses cross-appeal.

## ASSIGNMENT OF ERROR

Coffey assigns, consolidated and restated, that the district court erred in severing only the impact easement language from § 501.03(9)(A) and enforcing the remainder of that section. Coffey asserts that the court should have either (1) found § 501.03(9)(A) void in its entirety or (2) left § 501.03(9)(A) intact and removed the language from § 303.53 requiring that the impact easement be mutually agreed to.

On cross-appeal, the Kreifelses and Otoe County assign, restated, that the district court erred in determining that the mutual impact easement language in the zoning regulations constituted an unconstitutional delegation of legislative authority.

## STANDARD OF REVIEW

[1,2] The constitutionality of a statute or an ordinance is a question of law.[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.[2]

## ANALYSIS

### CONSTITUTIONALITY OF § 501.03(9)(A)

We first address the argument raised by the Kreifelses and Otoe County in their cross-appeal, as our resolution of this issue is dispositive of this appeal. On cross-appeal, the Kreifelses and

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[1] *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997).

[2] *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007).

Otoe County contend that the district court erred in finding that the mutual impact easement language in § 501.03(9)(A) of the zoning regulations was an improper delegation of legislative authority.

[3-5] The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.[3] The burden of demonstrating the constitutional defect rests with the challenger.[4] To successfully challenge the validity of a zoning ordinance, the party challenging must prove that the conditions imposed by the city in adopting the zoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose sought to be accomplished by the ordinance.[5]

Coffey contends that the district court correctly determined that the mutual impact easement requirement in the zoning regulations constituted an unconstitutional delegation of legislative authority. In general, Coffey claims that the provision in question violates due process because it gives owners of animal feeding and waste handling facilities the ability to arbitrarily and capriciously refuse the granting of an impact easement and, as a result, restrict Coffey's ability to use his land.

The starting points for analysis of this issue are the U.S. Supreme Court's opinions in *Eubank v. Richmond*[6] and *Cusack Co. v. City of Chicago*.[7] In *Eubank*, an ordinance was enacted that required the city's building committee to establish setback lines for a given piece of property whenever requested to do so by two-thirds of the adjacent property owners. The Court ruled that this ordinance was void. The Court stated that under the ordinance, "[o]ne set of owners determine[s] not only the extent of use but the kind of use which another set

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[3] *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002); *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995).

[4] *Maxon v. City of Grand Island*, 273 Neb. 647, 731 N.W.2d 882 (2007).

[5] *Gas 'N Shop v. City of Kearney, supra* note 3.

[6] *Eubank v. Richmond*, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912).

[7] *Cusack Co. v. City of Chicago*, 242 U.S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1917).

of owners may make of their property."[8] The Court explained that owners who have the authority to establish the line could do so based on their own interest, caprice, or taste, and "[i]t is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed."[9]

Five years after *Eubank*, in *Cusack Co.*,[10] the Court upheld a city ordinance that prohibited the construction of billboards in residential areas without the consent of the owners of a majority of the frontage property on the block in which the billboard was to be erected. The corporation seeking to construct the billboard argued that the ordinance was "a delegation of legislative power to the owners of a majority of the frontage of the property in the block 'to subject the use to be made of their property by the minority owners of property in such block to the whims and caprices of their neighbors.'"[11]

The Court rejected this argument and distinguished *Cusack Co.* from its previous holding in *Eubank*. The Court explained that

> [a] sufficient distinction between the ordinance [in *Eubank*] and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we

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[8] *Eubank v. Richmond, supra* note 6, 226 U.S. at 143.

[9] *Id.*, 226 U.S. at 144. See, also, *Seattle Trust Co. v. Roberge*, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928).

[10] *Cusack Co. v. City of Chicago, supra* note 7.

[11] *Id.*, 242 U.S. at 528.

have seen, a familiar provision affecting the enforcement of laws and ordinances.[12]

[6] From these cases, courts have derived a well-recognized, general rule for determining whether a consent provision violates due process as an unlawful delegation of legislative authority. If the action of a property owner has the effect of legislation in that the action *creates* the restriction or prohibition, then the ordinance or statute constitutes an unlawful delegation of legislative authority. But, if the consent is used for no other purpose than to *waive or modify* a restriction which the governing body has lawfully created and has provided for such a waiver or modification by those most affected, then the consent is regarded as being within constitutional limitations.[13]

[7] As the Court of Appeals for the District of Columbia explained, "[t]he Supreme Court has long held that a municipality may prohibit a disfavored use of property but permit private citizens to waive that prohibition and consent to the use."[14]

> In order for a legislative delegation to private citizens to survive a due process challenge, the Court instructs that two criteria must be satisfied. First, the underlying exercise of authority must be a reasonable regulation within the power of the government. . . . Second, the legislature's restriction must be in the form of a general prohibition, and the delegation must be in the form of permitting private citizens to waive the protection of that prohibition.[15]

We recognize and agree with that articulation of the applicable due process principles. Thus, the zoning regulation at issue in this case will survive Coffey's constitutional challenge if the regulation enacts a general prohibition that would be an otherwise reasonable and valid regulation and then delegates to

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[12] *Id.*, 242 U.S. at 531.

[13] *O'Brien v. City of St. Paul*, 285 Minn. 378, 173 N.W.2d 462 (1969). See, e.g., *Cross v. Bilett*, 122 Colo. 278, 221 P.2d 923 (1950); *Arno v. Alcoholic Beverages Control Commission*, 377 Mass. 83, 384 N.E.2d 1223 (1979); *Robwood Adv. Assoc. v. Nashua*, 102 N.H. 215, 153 A.2d 787 (1959); *Davis v. Blount County Beer Bd.*, 621 S.W.2d 149 (Tenn. 1981).

[14] *Silverman v. Barry*, 845 F.2d 1072, 1086 (D.C. Cir. 1988).

[15] *Id.* (citation omitted).

private citizens the mere opportunity to waive that prohibition. Here, we find that § 501.03(9)(A) meets this standard and is a constitutionally permissible legislative delegation.

The Nebraska Legislature has given Otoe County the power to pass zoning ordinances "for the purpose of promoting the health, safety, morals, convenience, order, prosperity, and welfare of the present and future inhabitants of Nebraska."[16] Otoe County, in accordance with this authority, adopted a comprehensive zoning plan and zoning regulations. As the Otoe County zoning regulation states, the intent of the general agricultural district is "to preserve and protect land best suited for agricultural uses by *preventing or regulating* the introduction, encroachment and location of . . . non-agricultural uses, including non-farm residential uses."[17] Otoe County accomplished this intent by, among other things, enacting § 501.03(9)(A) which, in general, prohibits the construction of single-family dwellings within certain distances of animal feeding and waste handling facilities, unless a mutual impact easement is obtained.

Had Otoe County desired to do so, it could have adopted a regulation, without the option of a mutual impact easement, that absolutely prohibited the construction of single-family dwellings within the setback distance set forth in the regulations. Stated differently, absolutely prohibiting the construction of single-family dwellings within the distances specified in the regulations would have been a reasonable setback and a valid exercise of Otoe County's police power.[18]

Coffey argues, however, that Otoe County did not intend to absolutely prohibit the construction of single-family dwellings within one-half mile of existing animal feeding or waste handling facilities. Rather, Coffey suggests that by creating the setback provision, Otoe County simply intended to regulate such construction. In support of this argument, Coffey notes

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[16] Neb. Rev. Stat. § 23-114.03 (Cum. Supp. 2006).

[17] § 501.01 (emphasis supplied).

[18] See Neb. Rev. Stat. § 23-114 et seq. (Reissue 1997 & Cum. Supp. 2006). See, also, *Schaffer v. City of Omaha*, 197 Neb. 328, 248 N.W.2d 764 (1977); *City of Beatrice v. Williams*, 172 Neb. 889, 112 N.W.2d 16 (1961).

that single-family dwellings are listed as a permitted principal use in the general agricultural district.

We are not persuaded by Coffey's argument. Although the zoning regulations contain a broad statement that single-family dwellings are a permitted principal use in the general agricultural district, § 501.03(9)(A) expressly limits this broad statement. Section 501.03(9)(A) provides, in relevant part, that

> [single-family] dwellings, if not on the same lot with and not of the same ownership as any existing confined animal feeding use, . . . any existing intensive animal feeding use, . . . or any waste handling facility, . . . *shall be separated from such use* by the minimum distance specified in Table 501.05 [(one-half mile in this case)].

It is clear from this language that single-family dwellings are not allowed within specified distances of animal feeding and waste handling facilities. And this prohibition is entirely consistent with Otoe County's stated intent for the creation of the general agricultural district, "to preserve and protect land best suited for agricultural uses."[19]

Notwithstanding the absolute prohibition set forth in the beginning of § 501.03(9)(A), the second portion of § 501.03(9)(A) provides that this absolute prohibition can be overcome, but only if both parties are able to agree to a mutual impact easement. However, if no agreement is reached, the prohibition remains in effect.

The regulations at issue simply afford the owners of animal feeding and waste handling facilities a limited opportunity to waive a restriction created by Otoe County, just as the ordinance in *Cusack Co.*[20] provided one-half of the property owners with the power to waive the billboard restriction. And since the property owners in *Cusack Co.* were not empowered to make the law and force it upon others, because the billboard prohibition remained in effect if they chose not to exercise their waiver power, neither are owners of animal feeding and waste handling facilities so empowered by the fact that Otoe County's restriction remains in effect if the owners choose not to exercise the

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[19] § 501.01

[20] *Cusack Co. v. City of Chicago, supra* note 7.

limited waiver power. In light of the foregoing discussion, we conclude that the mutual impact easement language in Otoe County's zoning regulations is not an unconstitutional delegation of legislative authority, and the district court erred in concluding otherwise.

In arguing to the contrary, Coffey relies on a 1907 opinion by this court, *State v. Withnell*.[21] In *Withnell*, a gas company applied for a permit to construct a gas storage facility. The application complied with all of the regulations except for a requirement that the gas company obtain the written consent of all the property owners within 1,000 feet of the site of the proposed facility. The application was denied because the gas company failed to acquire the necessary consent. The gas company challenged the validity of the consent requirement, and this court agreed, concluding that the ordinance, "in so far as it requires the written consent of the property owners, is void."[22]

*Withnell*, however, is distinguishable from the present case. In *Withnell*, this court concluded that the ordinance was not intended to be prohibitory. It was an unreasonable exercise of the police power because it involved delegating a balance between an "indispensable" public utility and the risk to public safety it represented, which we held to be undelegable.[23] Such is not the case here. And in any event, to the extent our analysis in *Withnell* is inconsistent with the later decisions of the U.S. Supreme Court, the Supreme Court's exposition of the Due Process Clause clearly controls.

Our conclusion that the regulation at issue is constitutional is dispositive of this appeal, and therefore, we need not address Coffey's assignments of error.

## CONCLUSION

We conclude that the district court erred in finding that the mutual impact easement language in Otoe County's zoning regulations constituted an unlawful delegation of legislative

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[21] *State v. Withnell*, 78 Neb. 33, 110 N.W. 680 (1907).

[22] *Id.* at 39, 110 N.W. at 682.

[23] *Id.* at 35, 110 N.W. at 681.

authority. Accordingly, we reverse the judgment and remand the cause to the district court with directions to affirm the ruling of the Otoe County Board of Adjustment.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., not participating.

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AARON SILA, APPELLEE, V.
KIRK SAUNDERS, APPELLANT.
743 N.W.2d 641

Filed January 11, 2008. No. S-06-1160.

1. **Boundaries: Time.** Under the doctrine of mutual recognition and acquiescence, while a boundary may be fixed in accordance with a survey, when a different boundary is shown to have existed between the parties for the 10-year statutory period, it is that boundary line which is determinative and not that of the original survey.
2. **Boundaries.** The fact that the true boundary is "knowable" because the deed contains a metes and bounds description that a registered surveyor could have properly marked on the land—but did not—does not preclude the property owners from acquiescing in a boundary that they believe corresponds with the deed's description.
3. ____. That a boundary line is, in fact, an approximation of the real boundary, does not preclude a finding of mutual recognition and acquiescence, so long as the acquiescing parties recognized this approximation as their actual boundary.
4. ____. The filial relationship rule has no bearing on a mutual recognition and acquiescence analysis.
5. ____. In order for mutual recognition and acquiescence to operate, there must be an assent, by words, conduct, or silence, in a line as the boundary.

Appeal from the District Court for Dakota County: WILLIAM BINKARD, Judge. Reversed and remanded with directions.

Lance D. Ehmcke, Jeremy J. Cross, and Joel D. Vos, of Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P., for appellant.

Paul W. Deck, of Deck & Deck, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

## NATURE OF CASE

Aaron Sila brought this action under Neb. Rev. Stat. § 34-301 (Reissue 2004) to establish the east boundary line of his property adjoining the property of the defendant, Kirk Saunders. Sila sought to establish the boundary line in accordance with the original government survey. Kirk asserted that under theories of mutual acquiescence and adverse possession, the historically recognized boundary should instead be acknowledged.

## BACKGROUND

The properties in issue were once part of a single 78-acre farm owned by Kirk's grandfather, Fred Saunders. Fred owned and farmed the land from the early 1940's until his death in 1961. After Fred's death, the land was divided into three parcels and given to his three sons: Vern Saunders, George Saunders, and Kirk's father, Eugene Saunders. George was given the smaller parcel of 18 acres immediately to the east of a county road. Vern and Eugene were each given adjacent 30-acre parcels to the east of George's 18 acres. A year later, Vern died, and his 30 acres were acquired by Eugene. Kirk eventually inherited a 20-acre segment of Eugene's 60 acres. That segment abuts the disputed 18-acre parcel originally given to George, and most recently acquired by Sila. It is the boundary between these two properties that is currently in dispute.

In 1962, George and Eugene set about establishing the shared boundary of their properties. Eugene's son and Kirk's brother, Elliotte Saunders, was a teenager at the time. He assisted in measuring the boundary and helped Eugene farm the land east of the 18-acre parcel until Eugene's death in 1989. Elliotte testified that their purpose in measuring and marking the boundary was "[t]o split the farm up to get a boundary line so [George] knew what he owned and what my dad owned."

George's 18 acres were legally described as: "The West Thirty-Six (36) rods of the North Half of the Northwest Quarter (N 1/2 NW 1/4) of Section Thirteen (13), Township Twenty-Nine (29) North, Range Seven (7) East of the Sixth Principal Meridian, Dakota County, Nebraska." George and Eugene decided not to hire a professional surveyor to mark the

boundary. There was a barbed wire fence along the north and south borders of the properties, and George and Eugene mistakenly believed that the middle of the county road represented a section line marking the west boundary of George's 18 acres. Thus, George and Eugene, with Elliotte's assistance, took a 100-foot tape measure and some flags and measured 594 feet (36 rods) east from the middle of the county road. Elliotte testified that they crimped a penny over the barbed wire and tied red flags on the fence at the 594-foot line of both the north and the south ends of the properties.

After this, George's crops were farmed on the west side of the boundary and were planted in a north-south direction. Eugene planted his crops on the east side of the boundary in an east-west direction. An aerial photograph from 1966 shows a clear demarcation between the two parcels that appears to be parallel to the county road from which the boundary had been measured.

Elliotte testified that over time, the red flags wore away. Along the north barbed wire fence, a row of trees grew up. Eventually, a tree grew into the barbed wire fence where the penny was crimped. The fence and the penny remained visible, however, embedded in a knot in the tree. The trees were later cut down, but the stumps remained, including the stump containing a piece of the barbed wire with a crimped penny around it. It is unclear when exactly the tree grew into the fence or when it was cut down, but, in any event, there is no evidence that the basic location of the crimped penny changed.

In 1965, Kirk moved into a mobile home placed on the southeast corner of Eugene's 60 acres. As part of the improvements around the home, they removed the barbed wire fence on the south end of the property. However, Kirk testified that before removing the fence, they placed a water well "right next to the property line" that was designated by the crimped penny in the south fence. Elliotte similarly testified that Kirk and George discussed the placement of the well and agreed to set it "kind of on the line" between the two properties. Although Kirk sought George's approval of the placement, there is no indication that Kirk asked George's permission to place the well on George's property. Rather, it appears that the discussion was to ensure

that the well was placed on Eugene's property. Elliotte testified that after the removal of the fence in 1965, the well was understood by George and Eugene to be the south visual marker for the boundary between their properties.

Elliotte testified that George and Eugene farmed their respective lands in accordance with the well on the south end and the crimped penny on the north end for 21 years. When George died in 1986, his 18 acres passed to his wife, Anna Saunders, who put the land into a trust. Eugene and Elliotte continued to farm Eugene's 60-acre parcel, and they also farmed Anna's land for the trust, but they maintained the crop boundary line according to the well/stump boundary.

When Eugene died in 1989, Elliotte continued to farm Anna's land and the 20 abutting acres inherited at this time by Kirk. At this time, Elliotte decided, for the sake of efficiency, to farm Kirk's 20 acres and Anna's 18 acres together without planting the crops in differing directions. Elliotte stated that he still considered the well and the tree stump as boundary markers. The evidence was inconclusive as to whether Anna or her trustee specifically recognized the well/stump boundary markers. Elliotte gave Anna's trust her share of the profits from the crops and divided the proceeds from the 20 acres between himself and Kirk.

Sila purchased the 18 acres from Anna's trust in 2001. He did not notice any demarcation between Anna's and Kirk's parcels at that time. Neither did he have a survey of the property conducted prior to the purchase to mark the boundary in accordance with the legal description. Sila testified that the real estate agent referred to the property line's being near a "high line pole" on the east end of the field in reference to the division of the properties. The location of this pole is not reflected in the record.

In 2005, Sila employed Fred Franklin, a licensed land surveyor, to survey and create a plat of his land. Franklin discovered that the centerline of the county road along the west side of Sila's property did not, in fact, as George and Eugene had believed, correspond to the section line. Franklin explained that while the county tries to build its roads to correlate to the section lines, this was not always possible, and that, in any event,

the centerline of roads can shift slightly over the years. Franklin did not notice either a stump or a well as visual markers of a boundary line. Franklin's survey demonstrates that the platted boundary of Sila's property lies east of the boundary claimed by Kirk.

Douglas Mordhorst, a registered land surveyor, was then hired by Kirk to survey the 18 acres in accordance with the stump and the well as boundary markers. With Elliotte's assistance, Mordhorst was able to pinpoint the location of these markers. Elliotte testified that since the dispute with Sila began, someone had covered the well with dirt such that it was no longer visible. Also, someone had dug up the stump and thrown it some distance away from its original location. Elliotte was able to retrieve the stump itself as evidence. He was able to find the stump's prior location by excavating its remainder from underground in the midst of a row of above-ground stumps along the north border of the properties. Because Elliotte was familiar with the location of the well, they were also easily able to excavate it.

Mordhorst's survey used the stump as the northeast corner and used the west edge of the well to reference the southeast corner, such that the entirety of the well was within Kirk's property. The survey also set forth the boundary of the property in accordance with its legal description, measuring from the actual section line on the west side. Mordhorst's and Franklin's surveys agree as to the boundary that correlates to the legal description of the property.

Mordhorst's survey illustrates the disputed area as a trapezoid that is narrower on the south end, encroaching approximately 5 fewer feet into the legally described 18 acres on the south end than on the north. The boundary Elliotte testified was recognized by George and Eugene thus did not run exactly parallel to the west road. Mordhorst testified that the printed exhibit representing the survey was not completely proportionate. Although the survey was to scale in the east-west direction, it was compressed in the north-south direction to fit onto a legal-sized sheet of paper. Mordhorst's survey established that there was a total of .264 of an acre in issue between the parties.

The district court ruled in favor of Sila, finding that Sila was the owner of the property in accordance with the boundary

described in the original plat. In its findings of fact, the court noted that while the aerial photograph showed the boundary as being parallel to the road, the exhibit representing Mordhorst's survey did not show a parallel line, and that thus, "it is not possible that the tract could be as Elliotte testified."

Furthermore, the court opined that as a matter of law, mutual acquiescence can only determine a boundary that is unknown. Since the true location of the boundary was set forth by the property's legal description and was readily ascertainable through conventional surveying techniques, the court concluded it was "known." Moreover, the court stated that Elliotte's mere opinion that the stump and well were a "demarcation of ownership" was insufficient to prove by a "preponderance of credible, competent evidence" that those markers were not simply considered by George and Eugene as a "temporary agreement" or "approximation" of the boundary. The court also rejected Kirk's adverse possession claim. Kirk appeals.

## ASSIGNMENTS OF ERROR

Kirk assigns, consolidated, that the district court erred in (1) determining that he had not established title to the disputed tract under the theory of mutual recognition and acquiescence, (2) holding that the filial relationship rule applies to his mutual recognition and acquiescence defense, and (3) failing to find that the stump and the well established the boundary line.

## STANDARD OF REVIEW

Actions brought under § 34-301 are in equity.[1] As such, we review the record de novo and reach an independent conclusion without reference to the conclusion reached by the trial court; except, however, that where credible evidence is in conflict, we give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.[2]

## ANALYSIS

[1] Under the doctrine of mutual recognition and acquiescence, while a boundary may be fixed in accordance with a

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[1] *Spilinek v. Spilinek*, 215 Neb. 35, 337 N.W.2d 122 (1983).

[2] *Id.*

survey, when a different boundary is shown to have existed between the parties for the 10-year statutory period, it is that boundary line which is determinative and not that of the original survey.[3] We have explained: "'The rule long established in this jurisdiction is that where a boundary, supposed to be the true line established by the government survey, is acquiesced in by the adjoining owners for more than ten years, it is conclusive of the location.'"[4]

The district court, in concluding that the well/stump boundary was not established by mutual acquiescence, relied on *Hakanson v. Manders*[5] for the proposition that the doctrine is simply unavailable when a deed to the disputed land sets forth clearly a known and certain metes and bounds description. This has never been the law. In *Hakanson*, we quoted the following statement from American Jurisprudence:

> "The cases approving the doctrine of acquiescence generally do not differentiate between cases where the boundary was uncertain or in doubt at the time it was first acquiesced in and cases where it was known and certain. However, in the second case, only adverse possession can avail the person claiming under the boundary so recognized."[6]

But, in *Lynch v. Egan*,[7] we rejected the landowner's argument that the boundary could not have been established by mutual recognition and acquiescence because the true line could have been ascertained by employing a county surveyor, stating: "[W]e do not understand the rule to be that in order that an agreement of that kind should be binding, the true line should be absolutely unascertainable."[8] As explained by the California

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[3] See *Kraft v. Mettenbrink*, 5 Neb. App. 344, 559 N.W.2d 503 (1997). See, also, *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987); *Converse v. Kenyon*, 178 Neb. 151, 132 N.W.2d 334 (1965); *Romine v. West*, 134 Neb. 274, 278 N.W. 490 (1938).

[4] *Hausner v. Melia*, 212 Neb. 764, 772-73, 326 N.W.2d 31, 37 (1982) (emphasis omitted).

[5] *Hakanson v. Manders*, 158 Neb. 392, 63 N.W.2d 436 (1954).

[6] *Id.* at 396, 63 N.W.2d at 439, quoting 8 Am. Jur. *Boundaries* § 72 (1937).

[7] *Lynch v. Egan*, 67 Neb. 541, 93 N.W. 775 (1903).

[8] *Id.* at 546, 93 N.W. at 777.

Supreme Court in *Price v. De Reyes*,[9] in fact, "[i]t is only where the true location is subsequently ascertained that actions of this kind arise." Thus, in other mutual recognition and acquiescence cases, although not directly addressing this issue, we have affirmed a boundary by mutual recognition and acquiescence even though an ascertainable metes and bounds description was apparently described by deed.[10]

[2] In *Lynch*, we explained that what was important was that the true line was actually unknown and uncertain to the parties acquiescing in the boundary. The parties were free to forgo the expense and trouble of having a survey conducted and to agree upon a division line. As stated by another court, "the fact that an accurate survey is possible is not conclusive of the question whether a doubt exists as to the location of a boundary."[11] It is the uncertainty in the minds of the landowners of the line *on the ground* that is relevant to the ability to acquiesce to a boundary, not the uncertainty in the written description of the deed.[12] That the true boundary is "knowable" because the deed contains a metes and bounds description that a registered surveyor could have properly marked on the land—but did not—does not preclude the property owners from acquiescing in a boundary they believe corresponds with the deed's description.[13]

The court alternatively found that Kirk had failed to prove that the well/stump line was anything other than "an approximation of the line . . . on a temporary basis." We disagree. In our de novo review of the evidence, it is apparent that George and Eugene understood the boundary they had marked to be the permanent, actual boundary between the properties. The boundary was set after being carefully measured and marked. The fact that

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[9] *Price v. De Reyes*, 161 Cal. 484, 489, 119 P. 893, 895 (1911).

[10] See, *Hausner v. Melia, supra* note 4; *Romine v. West, supra* note 3.

[11] *Kirkegaard v. McLain*, 199 Cal. App. 2d 484, 491, 18 Cal. Rptr. 641, 645 (1962).

[12] *Norwood v. Stevens*, 104 Idaho 44, 655 P.2d 938 (Idaho App. 1982).

[13] See, *Lynch v. Egan, supra* note 7; *Piotrowski v. Parks*, 39 Wash. App. 37, 691 P.2d 591 (1984); *Sanlando Springs Animal Hosp. v. Douglass*, 455 So. 2d 596 (Fla. App. 1984); *Wampler v. Sherwood*, 281 Or. 261, 574 P.2d 319 (1978); *Nunley v. Walker*, 13 Utah 2d 105, 369 P.2d 117 (1962).

there may have been error in the measurement, or even further error in the placement of the well, does not make the boundary established by the markers and recognized for 21 years thereafter a "temporary agreement" or "approximation."

The evidence is that the brothers, George and Eugene, farmed the land in opposite directions to keep their respective ownership clear. They each kept the profits from their respective crops. There is nothing in the record from which we could infer that George and Eugene simply did not care whether one of them was profiting off the other's land. Nor is there evidence that the boundary markers were not mutually recognized as the real boundary between the properties. Elliotte specifically testified that Eugene, his father, and George, his uncle, meant "[t]o split the farm up to get a boundary line so [George] knew what he owned and what my dad owned."

[3] That one of the crimped pennies was replaced by a well that might not have exactly corresponded to the initial measurement is of little consequence, because the well was actually acquiesced to as the south boundary marker for the statutory period. The fence on the south side with the crimped penny was there only for 3 years, until 1965. Nothing in Elliotte's testimony indicates that from 1965 to 1989, the crop line dividing the two farms ever changed. And Elliotte was intimately aware of this boundary because he farmed the land with Eugene during this period. That a boundary line is, in fact, an approximation of the real boundary, does not preclude a finding of mutual recognition and acquiescence, so long as the acquiescing parties recognized this approximation as their actual boundary. Insofar as there appears to be a crop line parallel to the road in the 1966 aerial photograph, we do not, as the district court did, find this to be contradictory to Kirk's claim. We have no reason to believe that a 5-foot variance from the parallel, in the boundary of an 18-acre property, would be readily discernible in an aerial photograph that was obviously taken from a great distance.

[4] Sila asserts that regardless of the other evidence, the filial relationship rule must defeat Kirk's claim. The filial relationship rule is recognized in adverse possession claims and establishes a rebuttable presumption that the use of the land was permissive

when the occupier of the land is a relative of the true owner.[14] This is relevant to claims of adverse possession because permissive use is inconsistent with the necessary element of hostility: that the true owner had actual or constructive notice that his or her title was in danger.[15] But, as noted recently by the Nebraska Court of Appeals in *Campagna v. Higday*,[16] the filial relationship rule has never been applied to a case involving a claim of mutual recognition and acquiescence. And the doctrine of mutual recognition and acquiescence does not rely on hostile possession—to the contrary, it depends on the landowners' agreement as to the boundary between their properties. We conclude that the filial relationship rule has no bearing on a mutual recognition and acquiescence analysis.

Finally, Sila argues that the evidence of the mutual recognition and acquiescence is insufficient because Kirk only presented his own testimony and that of his brother, Elliotte, who, Sila asserts, is biased in Kirk's favor. Sila points out that there was no testimony from neighbors or other witnesses to confirm Elliotte's and Kirk's testimony.

[5] In order for mutual recognition and acquiescence to operate, there must be an assent, by words, conduct, or silence, in a line as the boundary.[17] Elliotte's and Kirk's testimony established such conduct by a preponderance of the evidence. We will not discredit the testimony of Elliotte merely because he is Kirk's brother, just as we do not discredit Kirk's testimony merely because he is a party to the action. And the conduct of the various landowners between 1962 and 1989, established by physical evidence, substantiates Elliotte's and Kirk's testimony. It was Sila's burden to bring forth conflicting testimony if he thought it existed. As the record is presented to us, we find little dispute that George and Eugene in fact mutually recognized and acquiesced to the boundary represented in Mordhorst's survey, and we so find. Having found that the boundary was established

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[14] See, e.g., *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983).

[15] *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

[16] *Campagna v. Higday*, 14 Neb. App. 749, 714 N.W.2d 770 (2006).

[17] See *Spilinek v. Spilinek*, *supra* note 1.

by mutual recognition and acquiescence, we need not address Kirk's alternative theory that the boundary was established by adverse possession.

## CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court, and remand the cause with directions to enter judgment in favor of Kirk and to set the boundary between the properties in accordance with the stump and well markers as represented in the Mordhorst survey.

REVERSED AND REMANDED WITH DIRECTIONS.

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# AARON J. STENGER, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA AND BEVERLY NETH, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANTS.

743 N.W.2d 758

Filed January 11, 2008. No. S-06-1176.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
3. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
5. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
6. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
7. **Motor Vehicles: Licenses and Permits: Revocation.** Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees.
8. **Administrative Law: Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.

9. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, Edward G. Vierk, and Milissa Johnson-Wiles for appellants.

William D. Kurtenbach, of Kurtenbach Law Office, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

## NATURE OF CASE

The Department of Motor Vehicles and its director, Beverly Neth (collectively the Department), appeal the judgment of the district court for Platte County which concluded that "the ALR [administrative license revocation] statutory scheme for enhancement" denied Aaron J. Stenger due process of law and that "the Director accordingly erred in enhancing the period of Stenger's revocation from 90 days to 1 year."

## SCOPE OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005).

## FACTS

On April 23, 2006, an officer of the Columbus Police Department arrested Stenger for operating a vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004). The chemical test of Stenger's blood revealed a blood alcohol content of .125. After his arrest, Stenger was given a "NOTICE/SWORN REPORT/TEMPORARY LICENSE" (temporary license), which was valid for 30 days. The back of the temporary license stated:

"**ACCORDINGLY, NOTICE IS HEREBY GIVEN THAT YOUR OPERATOR'S LICENSE AND/OR OPERATING PRIVILEGE WILL BE REVOKED IN THIRTY DAYS FOR A PERIOD OF**: (B) . . . (3) One year, if your test results was [sic] **0.08** or more and you have ONE OR MORE PRIOR revocations within a 12-year period . . . ." The temporary license also provided that

> [t]he Director will consider the following issues at the hearing . . . .
>
> (1) Whether the law enforcement officer had probable cause to believe you were operating or in the actual physical control of a motor vehicle in violation of Section 60-6,196 or a city or village ordinance enacted pursuant to Section 60-6,196;
>
> (2) Whether you were operating or in actual physical control of a motor vehicle with an alcohol concentration of **0.08** or more.

On June 7, 2006, an administrative license revocation (ALR) hearing was held. During the hearing, a certified copy of Stenger's driving abstract was offered into evidence by the hearing officer. The abstract, a document maintained in the Department's computerized records, indicated that Stenger had a prior license revocation. Stenger objected to the offering of the abstract, claiming that the abstract was "not within the issues for an ALR hearing" and that receipt of the abstract would violate Stenger's due process rights because he was unable to challenge its validity. However, Stenger made no showing or mention to the hearing officer of any actual inaccuracy appearing on the abstract at that time or at any other time during the proceedings. The hearing officer overruled the objection and received the abstract into evidence.

On June 13, 2006, the director adopted the hearing officer's "Proposed Findings of Facts, Proposed Conclusions of Law, and Recommended Order of Revocation." In the order, the director found that Stenger had a prior revocation and consequently revoked Stenger's driver's license and operating privileges for a period of 1 year, effective June 14. Stenger appealed the director's decision to the Platte County District Court pursuant

to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Cum. Supp. 2004).

In his petition for judicial review, Stenger alleged that he was deprived of due process of law because the Department, without notice or opportunity to challenge or present evidence, expanded the issues at the ALR hearing to include evidence pertaining to a prior ALR revocation. The district court concluded that the ALR statutory scheme for enhancement denied Stenger due process. It therefore reduced Stenger's revocation from 1 year to 90 days. The court affirmed the director's order of revocation to that extent. Because the court determined Stenger was denied due process of law with respect to the director's enhancement determination, the court modified the director's order to reflect that Stenger's Nebraska driver's license and/or operating privileges should be revoked for the statutory period without enhancement, namely 90 days. The Department appealed.

Stenger has completed the 90-day revocation and now argues that the case is moot. The Department argues that the case is not moot because Stenger may be required to complete an additional 270 days of revocation or, alternatively, the public interest exception applies.

## ASSIGNMENTS OF ERROR

The Department claims, consolidated and restated, that the district court erred in finding that Stenger was denied due process because he was not afforded notice and an opportunity to be heard regarding any challenge to the accuracy of the Department's record establishing the prior ALR that was used for enhancement of his revocation.

## ANALYSIS

### Preliminary Question of Mootness

Stenger claims this action is moot because he has already completed the 90-day revocation. However, the Department argues that 270 days of revocation are still in dispute or that the public interest exception applies.

[2] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Rath v. City of*

*Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004). For the reasons set forth herein, we conclude that the action is not moot. The district court held that the ALR statutory scheme for enhancement denied Stenger due process of law. The constitutionality of a statute is squarely before us.

We therefore proceed to address the constitutionality of the ALR statutory scheme.

## Constitutionality of ALR Statutory Scheme

Neb. Rev. Stat. § 60-498.01 (Reissue 2004) provides for revocation of the driver's license of any person who has shown himself or herself to be a health and safety hazard (1) by driving with an excessive concentration of alcohol in his or her body or (2) by driving while under the influence of alcohol. As a part of the ALR statutory scheme, any arrested person who desires a hearing and has been served with a notice of revocation may file a petition requesting a hearing. See § 60-498.01(5)(c). Section 60-498.01(6) provides:

> (c) At hearing the issues under dispute shall be limited to:
>
> . . . .
>
> (ii) If the chemical test discloses the presence of alcohol in a concentration specified in section 60-6,196:
>
> (A) Did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 . . . and
>
> (B) Was the person operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of section 60-6,196.

Neb. Rev. Stat. § 60-498.02 (Reissue 2004) provides that a revocation is for 90 days unless the person's driving abstract shows one or more prior revocations in the previous 12 years. The question presented is whether Stenger was afforded notice and an opportunity to be heard regarding the issue of enhancement pursuant to § 60-498.02.

[3-5] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005). A statute is presumed to be constitutional, and all reasonable doubts will be resolved

in favor of its constitutionality. *Id.* The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Id.*

In the case at bar, the district court concluded that the ALR statutory scheme violated the procedural due process rights of motorists who were subject to an enhanced penalty for a prior revocation because the statutory scheme did not provide notice that enhancement would be an issue at the ALR hearing. We consider this a determination by the district court that the ALR scheme was unconstitutional as applied to Stenger in the enhancement of his license revocation.

[6,7] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006), *modified* 271 Neb. 683, 716 N.W.2d 44. Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. *Id.* Thus, the property interest involved here is Stenger's interest in retaining his driving privileges.

[8,9] Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Id.* In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.*

The basic question presented is whether Stenger received notice that his prior ALR would be used for purposes of enhancement and whether he was provided a reasonable opportunity to be heard on this issue.

The back of the temporary license provided to Stenger by the police officer stated:

> **ACCORDINGLY, NOTICE IS HEREBY GIVEN THAT YOUR OPERATOR'S LICENSE AND/OR**

> **OPERATING PRIVILEGE WILL BE REVOKED IN THIRTY DAYS FOR A PERIOD OF:**
>
> (B)(1) One year, if you refused the chemical test.
>
> (2) Ninety days, if your test result was **0.08** or more alcohol concentration and you do not have a prior revocation as described in paragraph (A) above.
>
> (3) One year, if your test results was [sic] **0.08** or more and you have ONE OR MORE PRIOR revocations within a 12-year period as described in paragraph (A) above.

At the June 7, 2006, ALR hearing, the hearing officer offered into evidence a copy of Stenger's driving abstract. Exhibit 2, which was entitled "COMPLETE ABSTRACT OF RECORD[,] NEBRASKA DEPARTMENT OF MOTOR VEHICLES," included a certification that it was a true and correct abstract of Stenger's driving record as contained in the Department's files. The exhibit contained an entry showing that Stenger had received a 90-day license revocation on November 10, 1998.

This abstract was maintained by the Department and was open to Stenger's inspection. See Neb. Rev. Stat. § 60-483 (Reissue 2004). At the ALR hearing, when exhibit 2 was offered into evidence, Stenger objected, stating:

> And I'll object to the abstract because the — it is not within the issues for an ALR hearing as set forth in Section 60-498.01 paragraph 6C(2). Further, we would object to that exhibit because we don't have an opportunity to challenge the validity of the [Department of Motor Vehicles] record, which purportedly shows a prior ALR revocation and therefore denies us due process.

Stenger made no showing to the hearing officer that the abstract contained any inaccuracy pertaining to his driving record or the prior ALR revocation. The hearing officer overruled the objection and received exhibit 2 into evidence.

The foundation for Stenger's attack of the ALR proceeding is based upon his claim that "[w]hen the Administrative License Revocation (ALR) statutory scheme (60-498.01 through 60-498.04, R.R.S., 1943 (Reissue 2004)), is examined, it is readily apparent that [Stenger] did not have any opportunity to challenge the actual existence of any prior ALR revocation

which may appear on his driving abstract." See brief for appellee at 5-6. He relies upon § 60-498.01(6)(c)(ii), which he claims limits the issues under dispute at an ALR hearing to the following:

> (A) Did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 . . . and
>
> (B) Was the person operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of section 60-6,196.

Stenger further argues that pursuant to § 60-498.02(1), the inquiry into whether a motorist had a prior ALR is not addressed until after the ALR hearing has been held and the director has made a finding that the motorist's license should be revoked. He asserts that under this statutory scheme where the issue of whether Stenger had a prior ALR (which could enhance the period of revocation from 90 days to 1 year) is only considered after the hearing is concluded, he has not been given an opportunity to challenge the actual existence of the prior ALR revocation.

Stenger relies on *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003), and § 60-498.01 to support his contention that the issues at the revocation hearing are limited to whether the officer had probable cause to believe that the person was operating or in control of the motor vehicle in violation of § 60-6,196 and whether such person had a blood alcohol concentration in violation of § 60-6,196.

Our holding in *Hass* does not prevent the consideration of a motorist's driving abstract for enhancement purposes. *Hass* dealt with the exclusion of Fourth Amendment search and seizure issues. In *Hass*, we found that forcing the State to litigate every element of a "driving under the influence" case at an ALR hearing would seriously undermine the Legislature's goal of providing an informal and prompt review of the decision to suspend a driver's license. We did not discuss the issue of enhancement or the admissibility of the motorist's driving abstract at the ALR hearing. The issue of enhancement under § 60-498.02(1) was not raised in *Hass*.

We do not interpret § 60-498.01 to exclude the receipt of evidence for the purpose of enhancement at a revocation hearing either. Although this section limits the issues under dispute, it does not prohibit evidence pertinent to the ultimate disposition of a case after those issues have been resolved. Whether a person's driver's license has previously been revoked is relevant evidence in determining the length of the revocation under § 60-498.02(1)(b).

Therefore, we conclude that § 60-498.01 does not bar the receipt of a driving abstract to enhance a revocation, and we hold that a driving abstract may be admitted in an ALR proceeding for that purpose. This holding does not prohibit a party from contesting the accuracy of the abstract as to whether the party did in fact have a prior revocation. Section 60-498.02(1)(b) explicitly provides that if a driving abstract shows that the driver had a revocation in the prior 12 years, the revocation can be enhanced to 1 year. Therefore, the Legislature clearly intended for the Department to consider such matter in the ALR proceedings.

The driving abstract introduced at the administrative hearing showed that Stenger had an ALR in the preceding 12 years. The record also shows that the Department, in response to Stenger's motion for discovery, sent to Stenger his driving abstract, a copy of the temporary license already provided to him, and the results of his blood alcohol test.

The record indicates that Stenger received a copy of his abstract on May 23, 2006. The matter came on for hearing before the hearing officer at 1:30 p.m. on June 7. After the hearing officer offered Stenger's driving abstract into evidence, Stenger had the opportunity to argue or present evidence supporting his claim as to the accuracy of the abstract.

After the hearing, the hearing officer prepared the following recommended order:

> Upon consideration of the Proposed Findings of Fact and Proposed Conclusions of Law, it is recommended that the Director of the Department of Motor Vehicles find: the peace officers had probable cause to believe Appellant [Stenger] was operating or in the actual physical control of a motor vehicle in violation of Neb. Rev. Stat.

> Sec. 60-6,196 or a city or village ordinance enacted pursuant to such section; that the Appellant was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of section 60-6,196[;] and that the Appellant has a prior Administrative License Revocation.

The director of the Department adopted the proposed findings of fact and conclusions of law and ordered that Stenger's Nebraska operator's license and operating privileges be revoked for 1 year, effective June 14, 2006.

We conclude that the district court erred as a matter of law in determining that Stenger was denied due process. The record establishes that Stenger was not denied either notice or the opportunity to challenge the accuracy of the driving abstract used for enhancement of his revocation. Stenger was given notice that enhancement would be at issue when he was given a copy of his driving abstract, which was the basis of the enhancement ordered by the director. The temporary license stated that his operator's license and/or operating privileges would be revoked for 1 year if his test result was .08 or more and he had one or more prior revocations within a 12-year period. The abstract was then offered by the Department at the hearing. The Department, by giving Stenger such notice and by furnishing him with a copy of his driving abstract which showed a prior revocation within a 12-year period, complied with the requirements of due process.

Section 60-498.02(1)(b) gives notice that if a driving abstract shows that the driver had a previous revocation in the prior 12 years, then the revocation will be enhanced to 1 year. Given the facts that the statute so provides and that Stenger was furnished a copy of the abstract on May 23, 2006, which was offered in evidence by the Department to enhance the revocation, we conclude that the requirements of due process have been met. Stenger had notice of the prior revocation and an opportunity to contest the existence of that revocation at the hearing.

## CONCLUSION

The district court erred in finding that Stenger was denied due process of law with respect to the director's ALR enhancement

determination. For the reasons stated herein, we reverse the judgment of the district court and remand the cause to the court with directions that it affirm the decision of the director to revoke Stenger's license for a period of 1 year. Stenger is to be given credit for the 90 days of revocation already completed.

REVERSED AND REMANDED WITH DIRECTIONS.

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## STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. EDOUARDO ZENDEJAS, RESPONDENT.

743 N.W.2d 765

Filed January 18, 2008. No. S-06-269.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.
3. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
4. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.
5. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
6. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
7. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Edouardo Zendejas, pro se.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

## INTRODUCTION

The office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, Edouardo Zendejas. After a formal hearing, the referee concluded that Zendejas had violated the Code of Professional Responsibility and recommended a suspension of 30 days. While we adopt the findings of the referee and conclude that Zendejas violated the Code of Professional Responsibility and the Nebraska Rules of Professional Conduct, we do not accept the discipline recommended by the referee. We instead impose discipline as indicated below.

## FACTS

On August 3, 2006, formal charges were filed by the office of the Counsel for Discipline against Zendejas. Those formal charges set forth one count, that Zendejas had violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); Canon 6, DR 6-101(A)(3) (neglecting legal matter); Canon 9, DR 9-102(B)(3) (failing to render appropriate account records to client); and DR 9-102(B)(4) (failing to promptly pay as requested by client funds that client is entitled to receive). The formal charges also alleged that Zendejas violated Neb. Ct. R. of Prof. Cond. 8.4(d) (rev. 2005) (engaging in conduct prejudicial to administration of justice), as well as his oath of office as an attorney.[1] In his answer, Zendejas disputed these allegations.

A referee's hearing was held on March 5, 2007. Zendejas, acting pro se, testified during the hearing. In addition, 18 exhibits were introduced into evidence. The referee's findings were announced in an April 5 report. The substance of those findings is as follows:

Zendejas was admitted to the practice of law in the State of Nebraska in 1991. He is authorized to practice law in several

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[1] Neb. Rev. Stat. § 7-104 (Reissue 1997).

tribal courts, including the Ponca Tribal Court and the Winnebago Tribal Court. Zendejas has worked full time as general counsel for the Omaha Tribe and teaches in the native studies department at the University of Nebraska at Omaha.

In approximately November 2003, Zendejas was retained by William Zuck to represent Zuck in a postconviction action in district court. Zendejas had not previously handled a postconviction action. On November 21, Zuck paid Zendejas $9,000. On December 3, 2004, Zuck paid Zendejas an additional $5,000.

Between November 2003 and October 2005, Zendejas failed to file a postconviction action on behalf of Zuck, despite his receipt of $14,000 from Zuck. On October 7, 2005, the Counsel for Discipline received a letter from Zuck regarding Zendejas' representation, in which Zuck sought, inter alia, a refund from Zendejas of moneys paid. On October 11, the Counsel for Discipline forwarded Zuck's letter to Zendejas and requested a written response. The Counsel for Discipline received no response and, on November 18, sent another letter to Zendejas requesting a response to Zuck's letter. On November 29, Zendejas notified the Counsel for Discipline that Zuck would be reimbursed in the amount of $11,368 within 10 days and that Zendejas would retain $2,632 in out-of-pocket expenses. Zuck notified the Counsel for Discipline that he would accept the $11,368 payment in settlement of his claim.

However, Zendejas did not reimburse Zuck within 10 days. On January 5, 2006, Zendejas was directed to provide to the Counsel for Discipline a copy of the refund check he had sent to Zuck. No response was received, and on January 19, the Counsel for Discipline again wrote Zendejas requesting a response to the January 5 letter. On January 27, the Counsel for Discipline converted Zuck's original letter of complaint into a grievance under Neb. Ct. R. of Discipline 9(E) (rev. 2001). The Counsel for Discipline sent Zendejas a certified letter directing Zendejas to answer, within 15 days, specific questions about his representation of Zuck.

On January 31, 2006, Zendejas replied to the Counsel for Discipline's January 27 letter, but did not answer the specific questions posed. Rather, Zendejas indicated that his failure to pay was the result of delays in a real estate closing. On

February 21, Zendejas sent to the Counsel for Discipline a letter and a copy of a check for $7,000 payable to Zuck. In the letter, Zendejas indicated that the balance would be paid to Zuck within 30 days. On that same day, the Counsel for Discipline informed Zendejas, via letter, that it was still requesting a written response to its January 27 letter.

Zuck eventually received the $7,000 check during the week of March 12, 2006. No explanation was given in the record as to the delay between the time the copy of the check was mailed to the Counsel for Discipline and Zuck's receipt of the check. At oral argument, Zendejas claimed the delay was due to an issue in which the particular envelope he used to send the check had been rejected by the correctional facility holding Zuck.

On March 27, 2006, Zendejas replied to the Counsel for Discipline's January 27 letter requesting information regarding his representation of Zuck. In that response, Zendejas indicated he would pay Zuck the balance due of $4,368 "as early as tomorrow, March 28, 2006." However, the Counsel for Discipline did not receive a copy of the final check, in the amount of $4,340, until May 8. We note that the final amount paid to Zuck was $28 less than the amount Zendejas indicated would be paid to Zuck.

The referee issued his report on April 5, 2007. In that report, the referee concluded Zendejas' conduct was in violation of DR 1-102(A)(1), DR 6-101(A)(3), DR 9-102(B)(3) and (4), rule 8.4(d), and his oath as an attorney. The referee recommended that Zendejas be temporarily suspended from the practice of law for a period of 30 days. No exceptions to this report were filed. On April 18, the Counsel for Discipline filed a motion for judgment on the pleadings, requesting that this court accept the referee's recommendation and enter judgment thereon.

## ANALYSIS

As an initial matter, we note that some of Zendejas' conduct at issue occurred prior to September 1, 2005, and is governed by the now-superseded Code of Professional Responsibility. Other conduct at issue occurred on or after September 1, 2005, the effective date of the Nebraska Rules of Professional Conduct, and is therefore governed by those rules.

[1-3] A proceeding to discipline an attorney is a trial de novo on the record.[2] To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.[3] Violation of a disciplinary rule concerning the practice of law is a ground for discipline.[4]

[4] As noted, neither party filed any written exceptions to the referee's report. Pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2005), the Counsel for Discipline filed a motion for judgment on the pleadings. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.[5] Based upon the undisputed findings of fact in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence. We specifically conclude that Zendejas has violated his oath of office as an attorney[6]; DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(B)(3) and (4) of the Code of Professional Responsibility; and rule 8.4(d) of the Nebraska Rules of Professional Conduct. Accordingly, we grant in part the Counsel for Discipline's motion for judgment on the pleadings.

[5] We have stated that the basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[7] Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or

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[2] *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007).

[3] *Id.*

[4] *Id.*

[5] *State ex rel. Counsel for Dis. v. Wickenkamp*, 272 Neb. 889, 725 N.W.2d 811 (2007).

[6] § 7-104.

[7] *State ex rel. Counsel for Dis. v. Petersen, supra* note 2.

(3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or

(4) Censure and reprimand by the Court; or

(5) Temporary suspension by the Court; or

(6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.

(B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.[8]

[6,7] With respect to the imposition of attorney discipline in an individual case, we have stated that each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[9] For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding.[10] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.[11]

We have considered the applicable law as well as the referee's report and recommendation, the findings of which have been established by clear and convincing evidence. In his report, the referee recommended that with respect to the discipline to be imposed, Zendejas should be suspended from the practice of law for 30 days. We disagree with the referee's recommendation, and to the extent that the Counsel for Discipline's motion for judgment on the pleadings requests that this court accept the referee's recommendation with respect to discipline, we overrule that motion.

The formal charges in this case allege that Zendejas failed for nearly 2 years to file a postconviction action on Zuck's behalf. Such neglect is of serious concern to this court. In addition, we express concern with Zendejas' failure to "promptly

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[8] See, also, disciplinary rule 10(N).

[9] *State ex rel. Counsel for Dis. v. Wickenkamp, supra* note 5.

[10] *State ex rel. Counsel for Dis. v. Petersen, supra* note 2.

[11] *Id.*

pay" to Zuck funds that Zuck was entitled to receive.[12] Finally, Zendejas repeatedly ignored requests from the Counsel for Discipline regarding his representation of Zuck. We have held that an attorney's failure to respond to inquiries and requests for information from the office of the Counsel for Discipline is considered to be a grave matter and a threat to the credibility of attorney disciplinary proceedings.[13]

In his report, the referee did not note any aggravating factors with regard to the imposition of discipline, but did note some factors with respect to mitigation. In particular, the referee noted that Zendejas' "attitude at the hearing was one of regret and remorse." The referee also stated that Zendejas

> has provided commendable service to his tribal community and to the legal community. He is the juvenile court "presenting officer" handling cases involving the Indian Child Welfare Act. In that regard, he provides a valuable service to underrepresented children in the Indian community. [Zendejas] has also served on the Ponca Tribal Court Advisory Board and has provided services in connection with the Ponca Tribe's domestic violence project. Respondent has assisted the Ponca Tribe in revising its election ordinance; assisted in the development of family science nights at three reservation schools; and provided training to the Iowa Department of Social Services, Western Region, dealing with the Indian Child Welfare Act.

Based upon our consideration of the record in this case, this court finds that Zendejas should be and hereby is suspended from the practice of law for a period of 120 days, effective immediately. Zendejas shall comply with Neb. Ct. R. of Discipline 16 (rev. 2004) and, upon failure to do so, shall be subject to a punishment for contempt of this court. At the end of

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[12] See *State ex rel. Counsel for Dis. v. Rasmussen*, 266 Neb. 100, 662 N.W.2d 556 (2003).

[13] *State ex rel. Counsel for Dis. v. Gilroy*, 270 Neb. 339, 701 N.W.2d 837 (2005); *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004); *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000).

the 120-day suspension period, Zendejas may apply to be reinstated to the practice of law, provided that Zendejas has demonstrated his compliance with rule 16 and further provided that the Counsel for Discipline has not notified this court that Zendejas has violated any disciplinary rule during his suspension. We also direct Zendejas to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), disciplinary rule 10(P), and Neb. Ct. R. of Discipline 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

## CONCLUSION

The motion of the Counsel for Discipline is sustained in part and in part overruled. We adopt the referee's findings of fact and conclude that Zendejas has violated DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(B)(3) and (4) of the Code of Professional Responsibility, and rule 8.4(d) of the Nebraska Rules of Professional Conduct, as well as his oath of office as an attorney.

It is the judgment of this court that Zendejas should be and hereby is suspended from the practice of law for 120 days, effective immediately.

JUDGMENT OF SUSPENSION.

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STATE OF NEBRASKA, APPELLEE, V.
DARREN L. BOSSOW, APPELLANT.
744 N.W.2d 43

Filed January 18, 2008. No. S-07-099.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, and an appellate court resolves such issues independently of the lower court's conclusions.
2. **Motions to Suppress: Search Warrants: Affidavits: Appeal and Error.** A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and considers it observed the witnesses.

3. **Criminal Law: Trial.** In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.
4. **Criminal Law: Statutes.** Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
5. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
6. **Statutes: Appeal and Error.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
7. **Controlled Substances: Statutes.** The "personal use exception" in Neb. Rev. Stat. § 28-401(14) (Cum. Supp. 2004) only applies to "preparation" and "compounding," but does not apply to the "production" of a controlled substance, even if that production is for personal use.
8. **Search Warrants: Affidavits: Probable Cause: Proof: Time.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. Proof of probable cause justifying the issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.
9. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
10. **Search Warrants: Probable Cause: Appeal and Error.** A magistrate's determination of probable cause to issue a search warrant should be paid great deference by reviewing courts.
11. **Search Warrants: Affidavits: Appeal and Error.** After-the-fact scrutiny by courts of the sufficiency of an affidavit used to obtain a search warrant should not take the form of a de novo review.

Appeal from the District Court for Pierce County: PATRICK G. ROGERS, Judge. Affirmed.

Kate M. Jorgensen and, on brief, Andrew D. Weeks, of Stratton & Kube, P.C., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Darren L. Bossow was convicted in a jury trial of possession of a controlled substance with intent to manufacture.[1] Bossow appeals, primarily arguing that the district court failed to properly instruct the jury with regard to the "personal use exception" in Neb. Rev. Stat. § 28-401(14) (Cum. Supp. 2004). Bossow also asserts that the court erred in denying his motion to suppress evidence obtained from a search of his residence and statements he made to law enforcement officials, and for overruling his motion to reopen his case. For the reasons that follow, we affirm the judgment of the district court.

## STATEMENT OF FACTS

### ACQUIRING SEARCH WARRANT

On April 20, 2006, Sandra Tighe, an investigator with the Nebraska State Patrol, prepared an affidavit for the purpose of securing a search warrant to search "the person of Darren L. Bossow," his two vehicles, and his residence. The first section in Tighe's affidavit contained background information describing her training and experience with the Nebraska State Patrol. This section also included general information relating to marijuana plants—specifically, that marijuana plants "can take up to 22 weeks to mature," "can grow in excess of eight (8) feet tall[,] and can produce up to one (1) pound of illegal usable plant material at the time of harvest." Tighe's affidavit further explained that based on her "training and experience," she knew that "individuals involved in the manufacture or growing of marijuana" may have in their possession, among other things, "firearms and ammunition"; "large amounts of cash . . . from the sales of the marijuana"; and "marijuana, packaging materials, processing articles, [or] articles of horticulture . . . on their person(s)."

In the second section of Tighe's affidavit, she explained that she had received a written report from another police officer, who had interviewed Ryan Lindstrom and B.J. Richtig. Lindstrom had informed the officer that on March 18, 2006, he and Richtig had been in Bossow's residence and had seen

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[1] Neb. Rev. Stat. § 28-416(2)(b) (Cum. Supp. 2006).

"a four foot tall marijuana plant and approximately five smaller three inch marijuana plants under a heat lamp in the living room area by the entertainment center." Lindstrom had stated that "all of the plants were potted and well taken care of" and that the larger marijuana plant was in the "'skunk'" stage of the growing process.

Tighe's affidavit stated that on April 3, 2006, Lindstrom, Richtig, and a third person had gone to Bossow's residence, but that Bossow had not been present. Lindstrom had, however, spoken to Bossow's son, who had told Lindstrom that the marijuana plants had been moved to Bossow's bedroom closet. Lindstrom had not seen the marijuana plants on April 3, but the house had a "strong nasty odor of marijuana on the inside while he was present."

Tighe also averred that on April 3, 2006, the police officer had interviewed Richtig and Colin Zuhlke. Richtig confirmed to the officer that he had gone with Lindstrom to Bossow's residence on March 18 and had seen the marijuana plants under a heat lamp in the living room. Richtig had described one of the plants as being 4 feet tall. Zuhlke had told the officer that he had been in Bossow's residence on March 19 and seen "four or five large marijuana plants in the living room between the entertainment center and the wall." Zuhlke had said that the plants were approximately 4 feet tall, potted like houseplants, and under lights. Tighe's affidavit also noted that she had interviewed Zuhlke on April 20, and he had confirmed seeing the marijuana plants in Bossow's residence on March 19.

Tighe's affidavit further stated that Bossow had previously been arrested and that on April 20, 2006, she had reviewed Bossow's Pierce County sheriff's office medical screening form, which had been filled out on April 2. In this form, Bossow had volunteered information that he used marijuana "occasionally and last used marijuana the previous day, April 1, 2006." The remaining sections of Tighe's affidavit provided, among other things, a description of Bossow's physical characteristics, the location of his residence, and a description of Bossow's vehicles.

Based on Tighe's affidavit, the district court issued a warrant to search "[t]he person of Darren Lee Bossow," his vehicles, and his residence.

DETAINING AND QUESTIONING BOSSOW

On April 21, 2006, in anticipation of executing the search warrant on Bossow's residence, the police officers who were to be involved in the search held a briefing. While the officers were conducting the briefing, an investigator, who was doing surveillance on Bossow's residence, called an officer at the briefing and said that Bossow was leaving his residence. As a result, Trooper Jason Sears was instructed to leave the briefing and detain Bossow until the search warrant had been executed.

Sears saw Bossow's car pull into the parking lot of a gas station and watched Bossow leave his car and enter the gas station. Sears testified that before following Bossow into the building, he noticed that Bossow's car had a cover around the outside of the license plate, such that Sears could not determine whether the car was currently registered. Sears entered the building and informed Bossow that he wanted to talk to Bossow outside, about his license plate. Once outside the building, Bossow identified himself to Sears as "Darren Bossow." But, when Sears asked for a driver's license or other proof of identity, Bossow was unable to produce any. It was later determined that Bossow's driver's license had been suspended.

Sears informed Bossow that he was going to take Bossow to the sheriff's office to "clear up the registration and his identity" and because there was an investigator at the sheriff's office who wanted to speak to Bossow. On cross-examination, Sears testified that the purposes for "[d]etaining" Bossow were first, to detain him "for the search warrant" and, second, because Bossow "didn't have identification and [Sears] wanted to be sure that was him for sure."

Sears handcuffed Bossow, placed Bossow in his police car, and began driving to the sheriff's office. While driving from the gas station to the sheriff's office, Sears advised Bossow of his *Miranda* rights.[2] When they arrived at the sheriff's office, Tighe approached Sears' police car and, while Bossow was still seated in the back of the car, gave Bossow a copy of the search

[2] See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

warrant. Tighe testified that after Bossow read the search warrant, Bossow admitted there was a marijuana plant in his house in an upstairs bedroom closet.

Sears took Bossow into the sheriff's office while Tighe and another officer remained outside and searched Bossow's car, which had been brought to the sheriff's office. The officers did not find any drugs or drug paraphernalia in Bossow's car. Following the search of Bossow's car, Tighe returned to the sheriff's office and again advised Bossow of his *Miranda* rights, after which Bossow signed a waiver of rights form.

Tighe testified that after reading Bossow his *Miranda* rights, she questioned him about the marijuana plants in his house. Tighe testified that Bossow told her that he had taken approximately eight marijuana seeds from marijuana that he had purchased and had planted those seeds in a ceramic pot. Bossow further explained that he watered the plants and placed them under a heat lamp to help them grow. On cross-examination, Tighe stated that Bossow told her that he "occasionally" used marijuana and that the marijuana plant was "an experiment" and was for his personal use.

### Execution of Search Warrant

On April 21, 2006, shortly after Bossow left his residence, police officers executed the search warrant at Bossow's residence. In Bossow's upstairs bedroom closet, police found a ceramic pot containing four marijuana plants, a heat lamp, and a water spray bottle. The marijuana plants had grown to be 3 to 4 feet in height. In other areas of the house, police also found two triple-beam scales and a marijuana pipe.

A police officer who assisted in the search testified that the marijuana plants had a "viable root system" and would "develop and if nurtured or cultivated [would] produce a product." The officer further testified that these plants were not "mature plants," nor were they "robust for this stage" of development. The officer stated that the plants were "about average" and that he had seen worse.

### Motion to Suppress

The State filed an information charging Bossow with possession of a controlled substance with intent to manufacture,

pursuant to § 28-416(2)(b). Bossow subsequently filed a motion to suppress all of the evidence seized as a result of the search, and all statements made to law enforcement on April 21, 2006. In support of his motion to suppress, Bossow argued that the search warrant was issued on the basis of an affidavit that failed to establish probable cause because the affidavit contained stale evidence. Bossow also argued that Sears did not have probable cause to detain him on April 21 and that as a result, the incriminating statements he made to law enforcement were not admissible.

Following a hearing, the district court overruled Bossow's motion to suppress. As to the incriminating statements, the court determined that "[i]t does not matter what the officer thought at the time he detained [Bossow]. The fact is that at that time the officer clearly had probable cause to arrest [Bossow] for operating a motor vehicle while his license was suspended." The court determined that Bossow's statements were admissible, based on this probable cause and the facts that Bossow was given his *Miranda* rights while being taken to the sheriff's office and again after arriving at the sheriff's office. The court further determined that the evidence presented in the affidavit was not stale and that as a result, there was probable cause supporting the magistrate's decision to issue the search warrant.

### Jury Instruction

A jury trial was conducted, and during trial, Bossow preserved the issues raised in his motion to suppress by making timely objections to the offered evidence. After the State had rested its case, Bossow moved for a directed verdict, citing *State v. Wyatt*[3] and the statutory exception in § 28-401(14) providing that "manufactur[ing] shall not include the preparation or compounding of a controlled substance . . . for [one's] own use." Bossow argued that the evidence at trial established that he qualified for the "personal use exception" in § 28-401(14). Specifically, Bossow pointed to Tighe's testimony on cross-examination that Bossow told her the marijuana plants were for

[3] *State v. Wyatt*, 6 Neb. App. 586, 575 N.W.2d 411 (1998), *overruled on other grounds, State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000).

his own personal use. The court overruled Bossow's motion for a directed verdict, finding that the State had produced sufficient evidence for the jury to deliberate on the charge of possession of a controlled substance with the intent to manufacture. Bossow rested his case.

The court then conducted a jury instruction conference. During the conference, Bossow moved to reopen his case in order to introduce a "lab report [that] has the weight of the marijuana" and "to allow [Bossow] . . . to testify in lieu of the court's interpretation of State v. Wyatt, about what is required as far as [Bossow's] burden or proof" relating to the "personal use exception." The State responded that it had anticipated that Bossow would testify, but when the defense rested, the State released its rebuttal witnesses. The court denied Bossow's motion to reopen his case.

Bossow also objected to jury instruction No. 6, which set forth the definitions of "manufacture" and "production" as defined in § 28-401(14) and (21). Jury instruction No. 6 stated, in relevant part:

> "Manufacture" shall mean the production, preparation, propagation, compounding, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and shall include any packaging . . . of the substance or labeling or relabeling of its container, except that manufacture shall not include the preparation or compounding of a controlled substance by an individual for his or her own use.
>
> "Production" shall include the manufacture, planting, cultivation, or harvesting of a controlled substance.

In addition to jury instruction No. 6, Bossow requested that the jury be given an instruction stating that "[if] you find by the greater weight of the evidence that the defendant prepared of [sic] compounded marijuana for his own use, you must find the defendant not guilty of possession of marijuana with intent to manufacture." The court overruled Bossow's objection and denied his requested instruction.

The jury found Bossow guilty of possession of a controlled substance with intent to manufacture, and the court convicted Bossow pursuant to that verdict. Bossow appeals.

## ASSIGNMENT OF ERROR

Bossow assigns that the district court erred in (1) refusing to instruct the jury on his burden of proof for the statutory "personal use exception," (2) overruling his motion for a directed verdict, (3) overruling his motion to suppress the evidence seized as a result of the search warrant, (4) overruling his motion to suppress the statements he made to law enforcement, and (5) overruling his motion to reopen his case.

## STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, and an appellate court resolves such issues independently of the lower court's conclusions.[4]

[2] A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and considers it observed the witnesses.[5]

[3] In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.[6]

## ANALYSIS

### "Personal Use Exception" in § 28-401(14) Does Not Apply to "Production" of Controlled Substance

Bossow was convicted of possession of a controlled substance with the intent to manufacture—specifically, production of marijuana. Section 28-401(14) defines "manufacture," in relevant part, as follows:

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[4] *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

[5] *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

[6] *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990), *disapproved on other grounds, State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999).

> Manufacture shall mean the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis . . . . *Manufacture shall not include the preparation or compounding of a controlled substance by an individual for his or her own use* . . . . [(Emphasis supplied.)]

"Production" is defined in § 28-401(21) as including "the manufacture, planting, cultivation, or harvesting of a controlled substance."

Bossow argues that the district court erred in not instructing the jury on the burden of proof Bossow was required to meet in order for the statutory "personal use exception" to apply. The State contends, and we agree, that the "personal use exception" is not available to Bossow because Bossow was charged with the "production" of marijuana, and pursuant to the plain language of § 28-401(14), the "production" of marijuana is not included within the "personal use exception." Our analysis in this regard is guided by well-established principles of statutory interpretation.

[4-6] Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.[7] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[8] If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.[9]

In defining the term "manufacture," § 28-401(14) uses six specific terms to describe what types of activity are proscribed. But of those six terms, only two are excluded from the definition

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[7] *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

[8] *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005).

[9] *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004).

of "manufacture" through application of the "personal use exception"—specifically, "preparation" and "compounding" of a controlled substance. We find it significant that the Legislature expressly limited the "personal use exception" to only two of the specified types of "manufacture" and did not include "production," which is the only accurate description of the conduct in which Bossow was alleged to have engaged.

The suggestion that growing marijuana is encompassed within the terms "preparation" or "compounding" of a controlled substance, as urged by Bossow, fails to recognize that "planting, cultivat[ing], or harvesting" a controlled substance is already clearly included within the definition of "production," as opposed to "preparation" or "compounding." In short, the production of marijuana is plainly prohibited. Had the Legislature intended to include within the "personal use exception" all of the activities included within the definition of "manufacture," it could have easily done so. The plain meaning of the "personal use exception" is to avoid finding an individual liable for the felony of manufacturing a controlled substance when that individual is already in possession of the controlled substance and is simply making it ready for use, such as rolling marijuana into cigarettes for smoking or combining it with other ingredients for use.[10] Given the plain language of the statute, it is evident that the Legislature intended to limit the application of the exception to only the "preparation" or "compounding" of a controlled substance.

Bossow contends that the "personal use exception" is applicable to this case, citing *Wyatt*,[11] a decision of the Nebraska Court of Appeals. In *Wyatt*, police officers, pursuant to a search warrant, searched David Wyatt's residence and found, among other things, a healthy marijuana plant growing in a bucket, marijuana seeds, and paraphernalia. Wyatt was charged with manufacturing a controlled substance, to wit, marijuana.

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[10] *State v. Childers*, 41 N.C. App. 729, 255 S.E.2d 654 (1979). See, also, *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002); *State v. Underwood*, 168 W. Va. 52, 281 S.E.2d 491 (1981); *People v Pearson*, 157 Mich. App. 68, 403 N.W.2d 498 (1987); *State v. Netzer*, 579 S.W.2d 170 (Mo. App. 1979).

[11] *State v. Wyatt, supra* note 3.

At trial, Wyatt argued that his conduct fell within the statutorily mandated "personal use exception" in § 28-401(14). Wyatt claimed that the State did not prove beyond a reasonable doubt that he violated the manufacture element of the statute because there was no evidence that the marijuana found in his residence was used for anything other than his own personal use. The Court of Appeals concluded that the burden was on Wyatt to prove that he fell within the "personal use exception,"[12] but he had failed to "offer any evidence to show that he was preparing or compounding the marijuana for his own personal use."[13] Accordingly, Wyatt's conviction for manufacturing marijuana was affirmed.

[7] But contrary to Bossow's argument, the issue in *Wyatt* was simply whether the defendant was required to prove that the marijuana was intended for his own "personal use." Whether the marijuana was being "produced," as opposed to "prepared" or "compounded," was not at issue. In short, *Wyatt* does not support Bossow's argument, which is without merit. We hold that the "personal use exception" in § 28-401(14) only applies to "preparation" and "compounding," but does not apply to the "production" of a controlled substance, even if that production is for personal use. Accordingly, because the "personal use exception" was not available to Bossow, the district court did not err in refusing to instruct the jury as Bossow had requested.

Bossow's second assignment of error is that the district court erred in overruling his request for a directed verdict based on his claim that he met the "personal use exception" to manufacturing. For the reasons stated, this assignment of error is also without merit.

### Information in Affidavit Was Sufficiently Related in Time to Issuance of Warrant to Justify Finding of Probable Cause

[8,9] Next, Bossow argues that the district court erred in overruling his motion to suppress because the affidavit supporting the search warrant contained stale evidence and therefore did not establish probable cause. A search warrant, to be valid,

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[12] See *State v. Taylor*, 221 Neb. 114, 375 N.W.2d 610 (1985).

[13] *State v. Wyatt*, *supra* note 3, 6 Neb. App. at 597, 575 N.W.2d at 419.

must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. Proof of probable cause justifying the issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.[14] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.[15]

In arguing that the information in the affidavit was stale, Bossow points to the fact that pursuant to the affidavit, the last time the marijuana plants in Bossow's residence had actually been seen was March 19, 2006, but the search warrant was not issued until April 20, approximately 1 month later. We explained in *State v. Faber*[16] that

> "'[t]here is no bright-line test for determining when information is stale. Whether the averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case, and the vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit. Time factors must be examined in the context of a specific case and the nature of the crime under investigation.' . . ."

We further stated that, where the affidavit recites a mere isolated violation, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating

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[14] *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001).

[15] *State v. Lammers*, 267 Neb. 679, 676 N.W.2d 716 (2004).

[16] *State v. Faber*, 264 Neb. 198, 213-14, 647 N.W.2d 67, 82 (2002).

activity of a protracted and continuous nature—a course of conduct—the passage of time becomes less significant.[17]

In the present case, notwithstanding the passage of time between the information in the affidavit and the issuance of the warrant, we find that the information in the affidavit was not too stale to establish probable cause. The information in the affidavit establishes that three separate individuals saw marijuana plants growing under a heat lamp in Bossow's residence approximately 1 month before the issuance of the search warrant.

The delay between the evidence collected in the affidavit and the issuance of the warrant is not significant when considered in light of the nature of the crime with which Bossow was charged. Growing marijuana is not an isolated activity where the evidence supporting probable cause tends to disappear quickly. Rather, growing marijuana is a protracted process, for which there is a much greater probability that the evidence related to the crime would remain on the premises for some time. As indicated in Tighe's affidavit, marijuana plants can take up to 22 weeks to mature and can grow in excess of 8 feet tall.

But here, the largest marijuana plant described in the affidavit was approximately 4 feet tall, and the other marijuana plants in Bossow's residence were much smaller than that. This information indicates that the plants were, at that time, in the early stages of development and unlikely to be harvested in the near future or removed from Bossow's residence. Given the particular circumstances of this case, we conclude that the passage of time was not fatal to the court's finding of probable cause.

[10,11] A magistrate's determination of probable cause to issue a search warrant should be paid great deference by reviewing courts.[18] After-the-fact scrutiny by courts of the sufficiency of an affidavit used to obtain a search warrant should not take the form of a de novo review.[19] In this case, the facts justifying the issuance of the warrant were sufficiently related

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[17] *Id.*

[18] *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996).

[19] *Id.*

to the time of the issuance of the warrant to justify the district court's finding of probable cause.

### Bossow's Detention Was Not Unreasonable Seizure and Statements He Made to Law Enforcement Are Admissible

In a related argument, Bossow claims that the information provided in the affidavit did not establish probable cause to search his person and that therefore, his detention was an unreasonable seizure, and the incriminating statements he made to law enforcement after he was detained should be suppressed. We disagree. When the evidence in the affidavit and the circumstances surrounding Bossow's detention are considered collectively, we find that Bossow's detention was not an unreasonable seizure.

As discussed above, the information in the affidavit was sufficient to establish probable cause to believe that Bossow was engaged in criminal activity—specifically, the manufacture of marijuana. And in particular, Tighe averred that individuals involved in the manufacture of marijuana may have evidence on their person, such as marijuana itself; large amounts of cash; weapons; or materials used for the production, processing, or packaging. Contrary to Bossow's argument, the affidavit established probable cause for the search of Bossow's residence and his person.

Nor did police act unreasonably in taking Bossow into custody and transporting him to the police station. A valid warrant to search Bossow had already issued. When contacted by police, Bossow was unable to produce identification and had been seen by police unlawfully operating a vehicle without a driver's license.[20] When considered collectively, the search warrant, the need to positively identify Bossow in connection with the search, and Bossow's unlawful behavior are sufficient to establish that seizing Bossow was reasonable.

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[20] See Neb. Rev. Stat. §§ 60-489 (Cum. Supp. 2006) and 60-4,111 (Reissue 1995).

### District Court Did Not Abuse Its Discretion in Overruling Bossow's Request to Reopen His Case

Finally, Bossow claims that the district court erred in overruling his motion to reopen his case and allow him to testify regarding the burden of proof for the "personal use exception." The withdrawal of a rest in a trial on the merits is within the discretion of the trial court.[21] As already discussed, the "personal use exception" was not available to Bossow. Nor did Bossow, in support of his motion, claim that he intended to proffer evidence that would change that conclusion. Instead, Bossow's motion was premised on his intent to proffer evidence relevant only to the misunderstanding of the "personal use exception" that the district court had correctly rejected. Thus, the district court did not abuse its discretion in refusing Bossow's request to reopen his case to present evidence relating to this exception. Bossow's final assignment of error is without merit.

## CONCLUSION

For the foregoing reasons, we find no merit to Bossow's assignments of error and affirm the judgment of the district court.

Affirmed.

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[21] *State v. Thomas, supra* note 6.

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# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Carol Pinard-Cronin, respondent.

743 N.W.2d 649

Filed January 18, 2008. No. S-07-275.

Original action. Judgment of public reprimand.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Per Curiam.

## INTRODUCTION

On March 16, 2007, formal charges were filed by the office of the Counsel for Discipline, relator, against Carol Pinard-Cronin,

respondent. The formal charges set forth two counts that included allegations that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); Canon 6, DR 6-101(A)(1) (handling matter not competent to handle); DR 6-101(A)(2) (inadequately preparing to handle legal matter); and DR 6-101(A)(3) (neglecting legal matter); as well as the following provisions of Neb. Ct. R. of Prof. Cond. (rev. 2005): rule 1.1 (providing competent representation to client), rule 1.3 (acting with diligence in representing client), rule 8.4(a) (violating disciplinary rules), and rule 8.4(d) (engaging in conduct prejudicial to administration of justice). The formal charges also alleged that respondent violated her oath of office as an attorney. Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent's answer in effect disputed certain of the allegations.

A referee was appointed who heard evidence. The referee filed a report on September 24, 2007. With respect to the formal charges, the referee concluded that respondent's conduct had violated DR 1-102(A)(5); DR 6-101(A)(1) through (3); rules 1.1, 1.3, and 8.4(a) and (d); and her oath as an attorney. The referee recommended that respondent receive a public reprimand and be placed on probation for a period of 18 months, during which time respondent would engage and work with a practicing attorney to monitor respondent's practice.

On October 26, 2007, relator filed a motion for judgment on the pleadings, requesting that this court accept the referee's recommendation and enter judgment thereon. The motion was not opposed. We grant relator's motion, and we impose discipline as indicated below.

## FACTS

The referee's hearing was held on September 17, 2007. Respondent testified during the hearing. A total of 16 exhibits were admitted into evidence.

The substance of the referee's findings may be summarized as follows: Respondent was admitted to the practice of law in the State of Nebraska in 2001. She has practiced in Douglas County, Nebraska.

With regard to count I of the formal charges, the referee found that on April 11, 2003, respondent was retained by Rex Moulton to represent him in a personal injury claim arising from an automobile accident. Respondent's practice essentially focuses on the areas of juvenile and family law, and Moulton's case was the first and only personal injury matter respondent has handled. On November 15, 2004, respondent filed suit on behalf of Moulton against Christine Roe in the district court for Douglas County. Respondent attempted to serve Roe but failed to serve Roe within 6 months of the filing of the lawsuit. On May 17, 2005, Moulton's lawsuit against Roe was dismissed by the district court, by which time the statute of limitations on Moulton's claim had run. The referee found that respondent failed to respond to telephone calls from Moulton regarding the status of his case, failed to inform him that his lawsuit had been dismissed, and failed to protect Moulton's claim from being lost due to the running of the statute of limitations.

With regard to count I, the referee found that in April 2006, Moulton filed a grievance with relator regarding respondent's handling of his personal injury case. A copy of Moulton's grievance letter was sent to respondent by relator with directions to respond in writing to the grievance. Respondent failed to respond. Respondent failed to answer two subsequent letters sent by relator directing respondent to respond to Moulton's grievance letter. After receiving a fourth request to respond to Moulton's grievance, respondent provided a response and effectively acknowledged that she had filed suit on behalf of Moulton and that the suit had been dismissed and was barred by the statute of limitations. Moulton subsequently brought a malpractice action against respondent, which respondent settled by paying $2,500.

With regard to count II of the formal charges, the referee found that on October 10, 2006, respondent's trust account check in the amount of $200 was presented to respondent's bank. At the time, respondent's trust account balance was $110.22. The bank honored the check and charged respondent a service fee, causing respondent's trust account to be overdrawn by a total of $120.78. On October 11, respondent's trust account checks in the amounts of $82 and $34 were presented to respondent's

bank. The bank honored the checks and charged respondent additional service fees, which caused respondent's trust account to be overdrawn by a total of $298.78. The bank sent relator a notice of respondent's trust account overdrafts. On October 24, relator wrote respondent and asked her to provide a written explanation as to why her trust account did not have sufficient funds to honor checks presented against it. Respondent was also asked to provide copies of all supporting documentation.

With regard to count II, the referee found that on October 26 and again on November 1, 2006, relator received additional notices from respondent's bank indicating that respondent's trust account was again overdrawn. On October 26 and again on November 1, relator wrote respondent and asked her to provide a written explanation as to why her trust account did not have sufficient funds to honor checks presented against it. Respondent was also asked to provide copies of all supporting documentation. On November 14, respondent sent relator a letter by facsimile transmission stating that the overdrafts were caused by two clients' checks that had been subsequently dishonored by their respective banks. Respondent stated in her letter that copies of her supporting documentation would be sent by regular mail. On December 28, after relator had not received respondent's supporting documentation, relator wrote respondent and asked her to provide that documentation as well as copies of certain checks and respondent's trust account bank statements for the period of August through November 2006. Respondent did not provide relator the supporting documentation or the requested copies.

With regard to the October and November 2006 overdrafts in respondent's trust account, the referee found that such overdrafts occurred when checks from two of respondent's clients were dishonored. The referee found that respondent's overdraft situation was "a fleeting, isolated, one time situation, which had never occurred before, and has not occurred since." The referee further found that the overdraft situation was not the result of either respondent's misappropriation of client funds or willful negligence. The referee found that no client was harmed by the overdraft situation and that respondent had taken immediate steps to rectify the overdraft situation.

Finally, the referee found that during the fall and winter of 2005 and 2006, respondent was encountering several "personal challenges." Two of respondent's children had sustained serious injuries in separate accidents, respondent's mother had suffered a stroke, and three members of respondent's family had died, one by suicide. The referee found that at the time of the hearing, respondent was seeing a mental health counselor. The referee also found that if respondent was allowed to continue in the practice of law, she intended to limit her practice to the areas of juvenile and family law.

The referee found that among the exhibits admitted into evidence were 14 letters written by juvenile court judges, lawyers, and others, all "express[ing] a high regard for [respondent's] skills as a juvenile law practitioner." Also included in the exhibits was a letter from respondent's mental health counselor to the effect that respondent was making progress in her counseling and setting realistic goals to avoid a reoccurrence of the situation that had resulted in the present disciplinary proceedings.

Based upon the evidence offered during the hearing, the referee found that certain of respondent's actions constituted a violation of the following provisions of the Code of Professional Responsibility: DR 1-102(A)(5) and DR 6-101(A)(1) through (3). The referee also found that certain of respondent's actions violated rules 1.1, 1.3, and 8.4(a) and (d) of the Nebraska Rules of Professional Conduct. Finally, the referee found that respondent's actions constituted a violation of respondent's oath of office as an attorney. With respect to the discipline to be imposed, the referee recommended that respondent receive a public reprimand and be placed on probation for a period of 18 months, during which time, respondent would engage and work with a practicing attorney to monitor respondent's practice.

No exceptions were filed to the referee's report. On October 26, 2007, relator filed a motion for judgment on the pleadings, in which relator moved this court to enter judgment in conformity with the referee's report and recommendation.

## ANALYSIS

We note that certain of respondent's conduct at issue in this case occurred prior to the September 1, 2005, effective date

of the Nebraska Rules of Professional Conduct and is, therefore, governed by the now-superseded Code of Professional Responsibility. We also note that certain of respondent's conduct at issue in this case occurred on or after September 1, 2005, and is therefore governed by the Nebraska Rules of Professional Conduct. We are nonetheless guided by the principles previously announced in our prior decisions under the Code of Professional Responsibility. See *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007).

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

As noted above, neither party filed written exceptions to the referee's report. Pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2005), relator filed a motion for judgment on the pleadings. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Wickenkamp*, 272 Neb. 889, 725 N.W.2d 811 (2007). Based upon the undisputed findings of fact in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted. Specifically, based upon the foregoing evidence, we conclude that by virtue of respondent's conduct occurring before September 1, 2005, respondent has violated the following provisions of the Code of Professional Responsibility: DR 1-102(A)(5) and DR 6-101(A)(1) through (3). We also conclude that by virtue of respondent's conduct occurring on or after September 1, 2005, respondent has violated the following provisions of the Nebraska Rules of Professional Conduct: rules 1.1, 1.3, and 8.4(a) and (d). Finally, we conclude that by virtue of respondent's conduct, respondent has violated her oath of office as an attorney, § 7-104.

We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Dortch, supra.* Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
>
> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, rule 10(N).

With respect to the imposition of attorney discipline in an individual case, we have stated that each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Wickenkamp, supra.* For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.* The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors. *Id.*

We have considered the referee's report and recommendation, the findings of which have been established by clear and convincing evidence, and the applicable law. Upon due consideration of the record, the court finds that respondent should be and hereby is publicly reprimanded. Further, the court finds that respondent shall be on probation for a period of 18 months, during which period respondent will:

(1) be monitored by an attorney approved by relator;

(2) provide the monitoring attorney, on a monthly basis, with a list of all cases for which respondent is then currently responsible, said list to include the following information for each case:

(a) the date the attorney/client relationship began;

(b) the type of case;

(c) the last date and type of work completed on the case;

(d) the next type of work and date to be completed on the case; and

(e) any applicable statute of limitations and its date;

(3) meet on a monthly basis with the monitoring attorney to discuss respondent's pending cases; and

(4) work with the monitoring attorney to develop and implement appropriate office procedures to ensure that client matters are handled in a timely manner.

If at any time the monitoring attorney believes respondent has violated a disciplinary rule, or has failed to comply with the terms of probation, the monitoring attorney shall report the same to relator.

Relator shall advise this court within 30 days of the filing of this opinion as to the attorney approved by relator to monitor respondent.

## CONCLUSION

Relator's motion for judgment on the pleadings is sustained. We find by clear and convincing evidence that respondent violated DR 1-102(A)(5); DR 6-101(A)(1) through (3); rules 1.1, 1.3, and 8.4(a) and (d); as well as her oath of office as an attorney. It is the judgment of this court that respondent should be and hereby is publicly reprimanded. It is the further judgment of this court that respondent shall be on an 18-month period of monitored probation, subject to the terms set forth above. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), disciplinary rule 10(P), and Neb. Ct. R. of Discipline 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

# IN RE INTEREST OF WALTER W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARTINA A., APPELLANT.

744 N.W.2d 55

Filed January 18, 2008. No. S-07-393.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Parental Rights: Proof.** To terminate parental rights, the State must prove by clear and convincing evidence that one or more of the statutory grounds listed in Neb. Rev. Stat. § 43-292 (Reissue 2004) have been satisfied and that termination is in the child's best interests.
3. **Indian Child Welfare Act: Parental Rights: Proof.** The Nebraska Indian Child Welfare Act adds two additional elements the State must prove before terminating parental rights in cases involving Indian children: the "active efforts" element and the "serious emotional or physical damage" element.
4. ____: ____: ____. The "active efforts" element under Neb. Rev. Stat. § 43-1505(4) (Reissue 2004) requires proof by clear and convincing evidence in parental rights termination cases.
5. ____: ____: ____. The "active efforts" standard under Neb. Rev. Stat. § 43-1505(4) (Reissue 2004) requires more than the "reasonable efforts" standard that applies in cases involving non-Indian children.
6. **Indian Child Welfare Act: Parental Rights.** To constitute "active efforts" under Neb. Rev. Stat. § 43-1505(4) (Reissue 2004), at least some efforts should be "culturally relevant."
7. ____: ____. The "active efforts" standard under Neb. Rev. Stat. § 43-1505(4) (Reissue 2004) requires a case-by-case analysis.
8. **Indian Child Welfare Act: Parental Rights: Proof: Expert Witnesses.** In an Indian Child Welfare Act case, the State must prove by clear and convincing evidence that terminating parental rights is in the child's best interests; this need not include testimony of a qualified expert witness.
9. **Parental Rights.** When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights.
10. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
11. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
12. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A judicial determination following an adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Marian G. Heaney, of Legal Aid of Nebraska, for appellant.

Regina T. Makaitis, Special Prosecutor, for appellee.

Sarah Helvey and Jennifer A. Carter for amicus curiae Nebraska Appleseed Center for Law in the Public Interest.

Mark C. Tilden, of Native American Rights Fund, and Marian G. Heaney, of Legal Aid of Nebraska, for amici curiae Yankton Sioux Tribe of South Dakota et al.

Shannon Smith, of Indian Child Welfare Law Center, and Padraic I. McCoy and Mandi L. Hill, of Faegre & Benson, L.L.P., for amicus curiae Indian Child Welfare Law Center.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Martina A. appeals the separate juvenile court's order terminating her parental rights to her son, Walter W. He is an Indian child, so the Indian Child Welfare Act (ICWA) applies. The juvenile court initially terminated Martina's parental rights in September 2005. The Nebraska Court of Appeals vacated the termination order in July 2006 because the State had failed to give the Yankton Sioux Tribe proper notice before the termination hearing. After retrial in January and February 2007, the juvenile court again terminated Martina's parental rights. Martina appeals, arguing the State failed to meet its burden under ICWA.

ICWA requires the State to prove that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family."[1] The main issues are whether the State (1) must prove the "active efforts" element beyond a reasonable doubt or by clear and convincing evidence and (2) met its burden in proving this element. We affirm because we conclude the State met its burden of proving, by clear and convincing evidence, that the Department of Health

[1] 25 U.S.C. § 1912(d) (2000); Neb. Rev. Stat. § 43-1505(4) (Reissue 2004).

and Human Services (the Department) made active efforts to provide remedial services and rehabilitative programs.

## I. PROCEDURAL BACKGROUND

Martina gave birth to Walter on January 2, 2003. The following day, the State filed a supplemental petition. It alleged Martina placed him in a situation injurious to his health or morals. The petition alleged she was unable to provide safe, stable, and independent housing for herself and her child and that her use of alcohol or controlled substances placed Walter at risk for harm. At the time, Martina had five other children who were under the juvenile court's jurisdiction because of Martina's faults or habits. The juvenile court placed Walter in the Department's temporary custody. Evidence later showed that Walter tested positive for amphetamine at birth.

In January 2003, Martina informed the court that she was an enrolled member of the Yankton Sioux Tribe and that Walter's father was an enrolled member of the Omaha Tribe. Later that month, after a continued detention hearing, the court ordered that Walter would remain in the Department's temporary custody. In May, the court found that Martina was an enrolled member of the Yankton Sioux Tribe and that Walter was eligible for enrollment. The court ordered that ICWA and its Nebraska counterpart, the Nebraska Indian Child Welfare Act (NICWA), would apply in all future proceedings. In November, the Yankton Sioux Tribe filed a notice to intervene. According to the parties, the court never heard or granted the tribe's motion.

In April 2004, the court declared Walter a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). After a disposition and permanency planning hearing in July, the court ordered that Martina (1) complete an inpatient chemical dependency treatment program, (2) participate in outpatient chemical dependency treatment until admitted for inpatient treatment, (3) maintain safe and adequate housing and a legal source of income, and (4) complete psychological and psychiatric evaluations.

On December 9, 2004, the State moved for termination of Martina's parental rights. The court heard the motion in June 2005 and terminated Martina's parental rights in September.

Martina appealed. The Court of Appeals determined the termination hearing was invalid because the State had failed to give proper notice to the Yankton Sioux Tribe as required under ICWA.[2] The court vacated the termination order and remanded the cause to the juvenile court for further proceedings following proper notice to the Yankton Sioux Tribe.[3]

After receiving the mandate, the juvenile court ordered another hearing on the motion to terminate parental rights. The special prosecutor notified the Yankton Sioux and Omaha Tribes. The court held the hearing on January 31 and February 1, 2007. The Yankton Sioux Tribe did not appear. The court terminated Martina's parental rights in March.

## II. ASSIGNMENTS OF ERROR

Martina assigns, restated, that the juvenile court erred in terminating her parental rights because the State failed to meet its burden of proof. In her second assignment of error, Martina asserts that the Court of Appeals' dismissal in an unrelated case precluded her from appealing the adjudication in this case.

## III. STANDARD OF REVIEW

[1] We review juvenile cases de novo on the record, and we reach our conclusions independently of the juvenile court's findings.[4]

## IV. ANALYSIS

[2,3] To terminate parental rights, the State must prove by clear and convincing evidence that one or more of the statutory grounds listed in Neb. Rev. Stat. § 43-292 (Reissue 2004) have been satisfied and that termination is in the child's best interests.[5] NICWA, however, adds two additional elements the State must prove before terminating parental rights in cases involving Indian children. First, § 43-1505(4) provides an "active efforts" element:

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[2] See *In re Interest of Walter W.*, 14 Neb. App. 891, 719 N.W.2d 304 (2006).

[3] *Id.*

[4] See *In re Interest of Destiny A. et al.*, *ante* p. 713, 742 N.W.2d 758 (2007).

[5] See *In re Interest of Xavier H.*, *ante p.* 331, 740 N.W.2d 13 (2007).

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Section 43-1505(4) is identical to its federal counterpart, 25 U.S.C. 1912(d). Second, Nebraska's § 43-1505(6) provides a "serious emotional or physical damage" element:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Section 43-1505(6) is identical to 25 U.S.C. § 1912(f).

1. The State Met Its Burden of Proving Active Efforts

Martina contends the State failed to prove that the Department made active efforts as required under ICWA.

(a) The "Active Efforts" Element Must Be Proved by Clear and Convincing Evidence

Before deciding whether the State met its burden in proving active efforts, we must first determine the standard of proof for this element. The language in § 43-1505(4) does not impose any particular standard of proof for the active efforts element. Section 43-1505(6), however, expressly requires the State to prove beyond a reasonable doubt that the child is likely to suffer serious emotional or physical harm if the parent retains custody.

Martina contends that the proper standard for the active efforts element is proof beyond a reasonable doubt. The State urges us not to adopt the "beyond a reasonable doubt" standard.

Martina directs our attention to *In re Interest of Phoenix L.*[6] In that case, the mother argued that a Nebraska Juvenile Code

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[6] *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006), *disapproved on other grounds, In re Interest of Destiny A. et al., supra* note 4.

section violated equal protection. She argued that the statute only required clear and convincing evidence to terminate parental rights in a case involving non-Indian children but that § 43-1505(6) of NICWA required proof beyond a reasonable doubt. We concluded that "the lower standard of proof under § 43-279.01(3) for the termination of parental rights to non-Indian children, as opposed to the higher standard of proof under the NICWA, does not violate the equal protection rights of parents of non-Indian children."[7] In discussing the "beyond a reasonable doubt" standard, we cited only the "serious emotional and physical damage" element under § 43-1505(6) for terminating parental rights. And we did not mention the active efforts element or its standard of proof; that issue was not before the court. We decline to read *In re Interest of Phoenix L.* as requiring proof beyond a reasonable doubt for all elements of an ICWA case.

Other jurisdictions are split on what standard should apply. For instance, the South Dakota Supreme Court assumed the burden to prove the serious emotional and physical damage element—beyond a reasonable doubt—would apply to prove the active efforts element.[8] Other courts have declined to apply the "beyond a reasonable doubt" standard to the active efforts element.[9] We join this latter group.

[4] Congress did not intend in 25 U.S.C. § 1912 to create a wholesale substitution of state juvenile proceedings for Indian children. Instead, in § 1912, Congress created additional elements that must be satisfied for some actions but did not require a uniform standard of proof for the separate elements. As discussed, Congress imposed a "beyond a reasonable doubt" standard for the "serious emotional or physical damage" element in parental rights termination cases under § 1912(f). Congress also imposed a "clear and convincing" standard of proof for the "serious emotional or physical damage" element

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[7] *Id.* at 884, 708 N.W.2d at 797-98.

[8] *People in Interest of S.R.*, 323 N.W.2d 885 (S.D. 1982).

[9] See, e.g., *Matter of Baby Boy Doe*, 127 Idaho 452, 902 P.2d 477 (1995); *In re M.S.*, 624 N.W.2d 678 (N.D. 2001); *In re Annette P.*, 589 A.2d 924 (Me. 1991).

in foster care placements under § 1912(e). The specified standards of proof in subsections § 1912(e) and (f) illustrate that if Congress had intended to impose a heightened standard of proof for the active efforts element in § 1912(d), it would have done so. Because it did not impose a heightened standard of proof, we decline to interpret § 1912(d)—and its Nebraska counterpart, § 43-1505(4)—as requiring the State to prove active efforts beyond a reasonable doubt. Instead, we conclude that the element requires proof by clear and convincing evidence in parental rights termination cases—the standard required for terminating parental rights under Nebraska law.

(b) The State Produced Sufficient Evidence to Find the Department Made Active Efforts

Martina contends the Department failed to make active efforts to provide remedial services and rehabilitative programs. Section 43-1505(4) is imprecise. The section provides that a party seeking to terminate parental rights to an Indian child "shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." This language sets out praiseworthy but vague goals for the courts to enforce. It fails to give us guidance in determining whether the Department's efforts were sufficient to meet ICWA's mandates.

[5-7] We do know, however, that the "active efforts" standard requires more than the "reasonable efforts" standard that applies in non-ICWA cases.[10] And at least some efforts should be "culturally relevant."[11] Even with these guidelines, there is no precise formula for "active efforts." Instead, the standard requires a case-by-case analysis.[12]

Martina asserts that the Department's efforts consisted largely of "'encouragement and referrals,'"[13] which she argues did not amount to active efforts.

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[10] See 390 Neb. Admin. Code, ch. 5, § 004.02D (1998).

[11] See *id.*

[12] See *Matter of Baby Boy Doe, supra* note 9.

[13] Brief for appellant at 27.

We begin by noting that the Department was unable to contact Martina from June 2003 until March 2004 because her whereabouts were unknown. It would have been impossible for the Department to provide services during that time.

After the Department regained contact with Martina, it tried to provide remedial services and rehabilitative programs. For instance, the case manager contacted inpatient chemical dependency treatment programs to verify the types of programs and program admittance requirements. The case manager gave Martina information about the programs and encouraged her to apply for programs she had not already considered. The case manager faxed necessary records to the programs at Martina's request. The record reflects that Martina told the case manager she was contacting one program weekly to gain admittance. Yet, when the case manager contacted the program, he was told Martina had not contacted the program in almost 2 months.

The case manager also encouraged Martina to attend an outpatient chemical dependency treatment program and gave her a packet of resources she could contact for outpatient treatment. On at least four occasions, he provided Martina a list of several community resources that could help with job skill development. He also gave Martina packets of community resources to obtain a psychiatric evaluation and referred her to a psychologist for a psychological evaluation.

For housing, the case manager reviewed a list of homeless shelters with Martina in August 2004 after she moved out of an apartment she was sharing with a roommate. He provided a telephone at the state office building so she could secure a bed at a shelter. In September, he gave Martina a letter addressed to the Omaha Housing Authority stating she was in need of housing to comply with her case plan. After Martina told him she intended to apply for assistance through the Omaha Housing Authority, he offered bus tickets for transportation to the Omaha Housing Authority office. Martina stayed at the Siena/Francis House shelter until October, when she was asked to leave the shelter because she was intoxicated. The case manager again reviewed a list of homeless shelters with Martina.

Besides these efforts, the Department provided Martina vouchers for rent, clothing, an electric bill, and drug testing;

bus tickets for transportation to Alcoholics Anonymous and Narcotics Anonymous appointments and to other services; and visitation with Walter, transportation of Walter for visitation, and foster care and medical care for Walter.

Martina points out some areas where the Department's efforts may have fallen short. First, Martina called a Department protection and safety administrator to testify at the second termination trial. When given a series of hypotheticals, this witness provided testimony suggesting that, from a Department policy standpoint, the case manager's efforts in some areas may not have constituted active efforts. Martina also points out that the agency the Department hired to provide visitation services missed or canceled multiple visits during a 5-month period in 2004. She also argues that she had trouble gaining admission to inpatient treatment programs. So, she argues that the case manager should have explored other services throughout Nebraska and Iowa or that he should have returned to the court to seek an amended case plan. And, she argues the Department should have tried to place Walter with relatives and should have created a written cultural plan for him that addressed his specific heritage. Although the case manager did not create a *written* cultural plan, he did discuss a cultural plan with the foster mother. We acknowledge, however, that the Department could have created a plan that better incorporated specific elements of Walter's heritage.

Although the Department could have taken more progressive actions in some of its efforts, we are satisfied that considering the entire record, the Department made active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family. We conclude the State proved by clear and convincing evidence that the Department made active efforts.

### 2. The State Met Its Burden in Proving Walter Would Likely Suffer Harm if Returned to Martina

As explained above, § 43-1505(6) requires a "determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent . . . is likely to result in serious

emotional or physical damage to the child." Martina argues that testimony by the State's expert failed to support, beyond a reasonable doubt, a finding that Walter's return to Martina is likely to cause Walter serious emotional or physical damage.

At the disposition hearing in July 2004, Dr. Kevin Cahill, a clinical psychologist, testified about whether the return of Walter to Martina at that time would result in serious emotional or physical damage to Walter. The parties stipulated to Cahill's qualifications as an expert under ICWA. An exhibit at the second termination hearing included his July 2004 testimony.

Cahill identified concerns that could affect Martina's ability to provide competent parenting for Walter. He stated that depression was an ongoing problem for Martina and that depressed parents are at a "very high risk" for neglecting their children.

He also expressed concern because a January 2002 evaluation showed narcissistic traits. He explained that for a narcissistic individual, "the needs of one's self always come first and everything else is secondary." He explained one of the primary minimal competencies an effective parent must have is the ability to "relegate the importance of one's own needs to the primacy of the child's needs."

Cahill further noted that Martina had been identified with an intermittent explosive disorder. He testified that "an individual with an intermittent explosive disorder is likely to simply blow up in rage and anger at intervals, sometimes with very little provocation or in response to a provocation that seems completely out of proportion to the level of response." He explained that such tendencies conflict with another minimal competency for parenting—the ability to withstand the frustrations of parenting without becoming overly reactive.

Cahill also testified at the first trial to terminate Martina's parental rights, and this testimony was included in an exhibit at the second trial. To prepare for the trial, Cahill reviewed a psychological evaluation from another psychologist dated December 2004. He stated the report increased his concerns about Martina's mental health. The other psychologist had made some additional diagnoses that had not previously been made. The other psychologist diagnosed Martina as dependent on methamphetamine, having an impulse control disorder,

possible posttraumatic stress disorder, and a history of bipolar disorder. He also diagnosed her with antisocial personality disorder. Cahill explained that personality disorders are typically lifelong, even though the patient can mitigate the intensity of some symptoms. Later in his testimony, Cahill opined that Martina would not make enough progress to provide permanency for Walter. He also opined that the return of Walter to Martina would result in "serious psychological and potentially physical damage."

On cross-examination, Martina's counsel challenged Cahill's reliance on the December 2004 psychological report because the report contained a test that could be skewed for members of different ethnicities, including Native Americans. For instance, Native Americans typically score higher on the scale that measures antisocial personality disorder. Cahill acknowledged the report did not expressly state that the authoring psychologist used a correction scale or information regarding the Native American population to interpret the results of the test.

Martina now contends that Cahill's testimony failed to show beyond a reasonable doubt that Walter's return to Martina would likely result in serious emotional or physical harm. She argues the testimony failed to support the "beyond a reasonable doubt" standard in part because of Cahill's reliance on the December 2004 report. She also claims the State failed to give Cahill evidence of her negative drug tests. She further claims the State failed to give Cahill a chemical dependency counselor's opinion that she had remained sober between May and August 2004.

After considering Martina's contentions and reviewing the record, including Cahill's testimony, we conclude the State proved beyond a reasonable doubt that returning Walter to Martina is "likely to result in serious emotional or physical damage" to Walter. Setting aside Martina's history of drug use, we note a likelihood that Martina's mental health issues could cause harm to Walter.

### 3. The State Proved That Terminating Martina's Parental Rights Was in Walter's Best Interests

Martina contends that the State's expert testimony was "insufficient to establish, beyond a reasonable doubt, that termination

was in [Walter's] best interests."[14] She again argues that Cahill lacked information in forming his opinion, specifically, evidence regarding negative drug tests and the counselor's opinion about her sobriety. She also argues that before a best interests determination can be made, it is necessary to know whether the child will be placed in a home consistent with ICWA placement preferences. She argues the State failed to give Cahill information about Walter's likely permanent placement.

[8] As explained above, the best interests element is imposed by state law and generally requires proof by clear and convincing evidence. We decline to extend the heightened standard in § 43-1505(6) to all elements of an ICWA parental rights termination case. Just as we did not apply the heightened standard to the active efforts element, we will not apply the heightened standard to the state law elements under § 43-292 for terminating parental rights. As noted by the Utah Court of Appeals, "ICWA does not preempt any state law grounds for termination of parental rights or impose a single burden of proof on all supporting findings in termination proceedings in which it applies."[15] We note that in *In re Interest of C.W. et al.*,[16] we "[found] that the State [had] prove[d] beyond a reasonable doubt that the best interests of the children require[d] termination of [the mother's] parental rights." This language appears in dicta, and to the extent it suggests the State must prove the best interests element beyond a reasonable doubt, we disapprove this language. Therefore, we hold that the State must prove by clear and convincing evidence that terminating parental rights is in the child's best interests; this need not include testimony of a qualified expert witness. Martina's argument that the State's expert testimony was insufficient to establish the best interests element beyond a reasonable doubt is without merit.

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[14] Brief for appellant at 35.

[15] *K.E. v. State*, 912 P.2d 1002, 1004 (Utah App. 1996). See, also, *In re M.S.*, *supra* note 9; *In re Interest of D.S.P.*, 166 Wis. 2d 464, 480 N.W.2d 234 (1992); *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992).

[16] *In re Interest of C.W. et al.*, 239 Neb. 817, 831, 479 N.W.2d 105, 115 (1992).

[9] When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights.[17] The court originally removed Walter from Martina's custody because of her illegal drug use. With Martina's history of drug abuse, we are concerned that she failed to complete requested urinalysis screenings. We recognize that Martina submitted some negative urinalysis screenings in 2004 and 2005. But between January and May 2005, she failed to complete 10 urinalysis screenings that the case manager requested.

In addition to the missed urinalysis screenings, the record shows that Martina has not acquired the responsibility needed to parent a child. For instance, in October 2004—2 weeks before Martina delivered her next child—she was asked to leave the shelter where she was staying because she was intoxicated. In June 2006, she called the case manager seeking advice on how to keep custody of any other children she might have. She told the case manager she was living with a man she had previously lived with and wondered if that would affect her ability to keep custody of any other children. This man was about 20 years old and a former ward of the State. Martina had reported in 2004 that she asked him to leave her home because he admitted to sexually abusing another child when he was 12 years old. Viewed through the lens of life's experiences, these two examples illustrate that Martina does not appreciate the responsibilities of parenting.

The record also shows that the director of ICWA affairs for the Yankton Sioux Tribe attended a foster care review board meeting in October 2004. A report created after the meeting stated, in part: "[The director] indicated that permanency for Walter is of utmost importance. He indicated that the tribe would not object to termination of [Martina's] rights, as [the tribe] would like Walter to be adopted." Similarly, Cahill opined that based on Martina's diagnoses and her history, she cannot provide permanency for Walter.

[10] When the court first terminated Martina's parental rights in September 2005, Walter had spent his entire life, 2½ years,

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[17] See *In re Interest of Destiny A. et al., supra* note 4.

in foster care. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.[18] We conclude the State provided clear and convincing evidence that terminating Martina's parental rights is in Walter's best interests.

### 4. We Do Not Reach the Merits of Martina's Second Assignment of Error

[11,12] As her second assignment of error, Martina argues that the court erred at the adjudication stage because she claims ICWA requires a finding of active efforts at adjudication and the court did not make such a finding. We have stated that a proceeding before a juvenile court is a "special proceeding" for appellate purposes.[19] We have further held that a judicial determination following an adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order.[20] Martina did not appeal the court's adjudication order.

Martina, however, argues "[t]his issue cannot be dismissed as a collateral attack on a final order from which [she] failed to perfect an appeal."[21] She claims the Court of Appeals' dismissal of an appeal in an unrelated case precludes appeals from adjudications or dispositions in ICWA cases.[22] Martina's belief that the unrelated Court of Appeals' dismissal precluded her appeal in the present case does not excuse her failure to appeal the adjudication order. Martina could have asked the Court of Appeals to overrule its prior ruling. Because Martina failed to appeal the adjudication order, we will not address her arguments about alleged errors at the adjudication stage.

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[18] See *id.*

[19] *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

[20] *Id.*

[21] Brief for appellant at 40.

[22] See *In re Interest of David T.*, 12 Neb. App. xlii (No. A-03-589, Nov. 5, 2003).

## V. CONCLUSION

We conclude that in termination of parental rights cases, the standard of proof for the "active efforts" element in § 43-1505(4) is proof by clear and convincing evidence. We determine that the State proved by clear and convincing evidence that the Department made active efforts. We also conclude that the State met its burden in proving the "serious emotional or physical damage" element and that terminating Martina's parental rights is in Walter's best interests. Because Martina failed to appeal the adjudication order, we do not reach the merits of her second assignment of error.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
MICHAEL J. RAMIREZ, APPELLANT.
745 N.W.2d 214

Filed January 25, 2008. No. S-06-920.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
3. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented

both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.

4. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
5. **Constitutional Law: Sentences: Legislature: Intent.** Where the Legislature intends to impose multiple punishments, imposition of such sentences does not violate the Constitution.
6. **Prior Convictions: Habitual Criminals: Sentences: Statutes.** A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute.
7. **Prior Convictions: Sentences.** The use of a prior conviction to establish status as a felon and then enhance a sentence does not constitute impermissible double enhancement.
8. **Criminal Law: Statutes: Legislature: Intent.** Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, a court may not manufacture ambiguity in order to defeat that intent.
9. **Search Warrants: Affidavits.** An affidavit in support of a search warrant need not contain a separate statement of facts showing why the public interest requires that the warrant be served at night, in order for the nighttime search to be valid.
10. ____: ____. If an affidavit in support of a search warrant, read in a commonsense manner and as a whole, reasonably supports the inference that the interests of justice are best served by the authorization of nighttime service of a search warrant, provision for such service in the warrant is proper.
11. **Search Warrants.** Neb. Rev. Stat. § 29-411 (Reissue 1995) codifies the common-law requirement of knocking and announcing when serving a search warrant prior to breaking into a person's dwelling.
12. **Constitutional Law: Search and Seizure: Intent.** The Fourth Amendment to the U.S. Constitution requires, absent countervailing circumstances, that officers knock and announce their purpose and be denied admittance prior to breaking into a dwelling.
13. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
14. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffective assistance of counsel analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if they are found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
15. **Criminal Law: Weapons.** Where actual or constructive possession of a firearm by a felon is uninterrupted, it constitutes a single offense.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

## I. NATURE OF CASE

Michael J. Ramirez was convicted by the district court in 2004 with use of a firearm to commit a felony,[1] being a felon in possession of a firearm,[2] and terroristic threats.[3] Ramirez was also found to be a habitual criminal.[4] Ramirez was acquitted by a jury of a count of possession of methamphetamine. Ramirez was sentenced, collectively, to terms of imprisonment totaling not less than 25 nor more than 50 years. His trial counsel also served as counsel on direct appeal, and the only issue raised in his brief was whether his sentences were excessive. The Nebraska Court of Appeals summarily affirmed.[5]

Ramirez filed a motion for postconviction relief in the district court on November 23, 2005, alleging ineffective assistance of counsel in several respects. The court, after an evidentiary hearing, denied Ramirez' motion, and he appeals. The evidence pertinent to the issues Ramirez raises on appeal will be set forth below, in conjunction with our analysis of each issue.

## II. ASSIGNMENTS OF ERROR

Ramirez assigns, consolidated and restated, that the district court erred in failing to conclude that

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[1] See Neb. Rev. Stat. § 28-1205 (Reissue 1995).

[2] See Neb. Rev. Stat. § 28-1206 (Reissue 1995).

[3] See Neb. Rev. Stat. § 28-311.01(1)(a) (Reissue 1995).

[4] See Neb. Rev. Stat. § 29-2221 (Reissue 1995).

[5] See *State v. Ramirez*, 13 Neb. App. xxxix (No. A-04-1398, May 5, 2005).

(1) his rights to double jeopardy and due process were violated when the same felony conviction was used as a predicate for (a) being a felon in possession of a firearm and (b) the habitual criminal enhancement of his sentence for being a felon in possession of a firearm;

(2) he was deprived of effective assistance of counsel when counsel failed to adequately seek the suppression of evidence obtained from the search of his residence; and

(3) he was deprived of effective assistance of counsel when his counsel failed to (a) object to inadmissible evidence, (b) introduce favorable evidence, and (c) impeach witnesses at trial with inconsistent evidence from the affidavit used to obtain the search warrant.

## III. STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[6] an appellate court reviews such legal determinations independently of the lower court's decision.[7]

## IV. ANALYSIS

[2] Ramirez' arguments are each framed by whether he was denied effective assistance of counsel at trial. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland*,[8] to first show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant

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[6] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[7] *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

[8] *Strickland, supra* note 6.

must show that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[9]

[3] Before addressing the specific arguments Ramirez makes on appeal, we note that the issues raised are not procedurally barred. Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal,[10] when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.[11]

### 1. Double Jeopardy

Ramirez argues that his rights under the Double Jeopardy Clause were violated when the same felony conviction was used to prove his status as a felon for the charge of being a felon in possession of a firearm, then prove he was a habitual criminal for the purpose of enhancing his sentence on that charge. Ramirez claims that his right to effective assistance of counsel was violated because trial counsel did not object to the sentencing enhancement on double jeopardy grounds. The postconviction court rejected this argument, concluding that Ramirez was not prejudiced by counsel's failure to object because the Double Jeopardy Clause does not preclude the use of the same felony to establish felon status and then enhance a sentence.

#### (a) Background

The information charging Ramirez with being a habitual criminal alleged three predicates: (1) a 1991 conviction for possession of marijuana with intent to deliver, (2) a 1999 conviction for theft, and (3) a 2000 conviction for manufacturing or distributing marijuana. But at sentencing, the State only

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[9] *Sims, supra* note 7.

[10] *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[11] *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

presented evidence of the 1991 and 2000 convictions to support sentencing as a habitual criminal. And, as previously noted, Ramirez was convicted pursuant to jury verdict of being a felon in possession of a firearm. The only evidence adduced at trial to establish Ramirez' status as a felon was evidence of the 2000 marijuana conviction. The habitual criminal finding was used to enhance Ramirez' sentence for being a felon in possession of a firearm.

Trial counsel testified in his deposition, on postconviction, that he "briefly" considered the double jeopardy implications of the charges, but did not pursue the issue "[w]hen [he] noticed there were three prior felonies as opposed to two." Counsel later admitted that he did not specifically consider the double jeopardy implications of using the same felony conviction for the offense of felon in possession and then for the habitual criminal enhancement.

(b) Analysis

[4,5] The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[12] Ramirez' argument here seems to be that he is being subjected to multiple punishments for the same offense, although his argument also implicates statutory interpretation. However, in this context, the two inquiries are related. As the U.S. Supreme Court has explained with respect to the prohibition on multiple punishments, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[13] The question of what punishments are constitutionally permissible is no different from the question of what punishment the legislative

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[12] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

[13] *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

branch intended to be imposed.[14] Where the Legislature intends to impose multiple punishments, "imposition of such sentences does not violate the Constitution."[15] With those principles in mind, we turn to the statutes at issue in this case.

Section 28-1206(1) provides that "[a]ny person who possesses any firearm . . . and who has previously been convicted of a felony . . . commits the offense of possession of a deadly weapon by a felon . . . ." Possession of a firearm by a felon is a Class III felony.[16] And § 29-2221(1) provides, subject to certain exceptions not relevant here, that

> [w]hoever has been twice convicted of a crime, sentenced, and committed to prison . . . for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal and shall be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .

It is clear that standing alone, neither § 28-1206 nor § 29-2221 implicates double jeopardy.[17] Ramirez does not contend otherwise. Instead, he relies on our decisions in *State v. Chapman*[18] and *State v. Hittle*,[19] which he claims are applicable.

In *Chapman*, the defendant was charged with third-offense driving under the influence of alcoholic liquor (DUI) and being a habitual criminal. Evidence was received of three prior convictions for DUI, and the trial court found that the offense with which the defendant was charged was a third offense. The defendant had previously been convicted of two felonies: third-offense DUI and malicious destruction of property. Based

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[14] *Albernaz v. United States*, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). Accord *Hunter, supra* note 13.

[15] *Albernaz, supra* note 14, 450 U.S. at 344.

[16] § 28-1206(3)(b).

[17] See, *State v. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001); *Addison v. Parratt*, 208 Neb. 459, 303 N.W.2d 785 (1981). See, also, *Witte v. United States*, 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995).

[18] *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980).

[19] *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999).

upon those two felonies, the court sentenced the defendant as a habitual criminal under § 29-2221.[20]

On appeal, we rejected the defendant's constitutional claims.[21] But we concluded that the trial court had erred in its interpretation of the relevant statutes. We explained:

> For the first time, this court faces the question of whether a previous conviction of an offense made a felony solely by reason of a previous conviction may be utilized as a basis for an adjudication of habitual criminality under the habitual criminal statute. We hold that offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute "felonies" within the meaning of prior felonies that enhance penalties under the habitual criminal statute.
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> The weight of authority is against double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute. . . . [T]hese decisions do not rest on federal constitutional grounds. The issue of whether, upon conviction of a misdemeanor, sentence could be imposed on a felony charge under a habitual criminal statute rests on an interpretation of state law.[22]

We noted that "[s]everal states have held that penalty enhancement provisions set forth for subsequent offenses of specific crimes must be used when applicable instead of sentencing under a habitual criminal act, implying that both statutes may not be used for double penalty enhancement in sentencing for one offense."[23] Adopting that reasoning, we concluded that a felony based on a multiple-offense DUI was exempt from the operation of § 29-2221.

In *Hittle*,[24] the defendant was convicted of felony flight to avoid arrest and felony driving under a 15-year license

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[20] See *Chapman, supra* note 18.

[21] See *id.*

[22] *Id.* at 370, 287 N.W.2d at 698-99 (citations omitted).

[23] *Id.* at 371, 287 N.W.2d at 699 (emphasis omitted).

[24] *Hittle, supra* note 19.

suspension. The trial court found the defendant to be a habitual criminal, based on two predicate terms of imprisonment, one of which was for second-offense driving on a suspended license.

[6] On appeal, we acknowledged that *Chapman* was distinguishable, because even first-offense driving under a 15-year license suspension is a Class III felony.[25] But we explained *Chapman* as resting upon two general principles:

> (1) A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute and (2) the specific enhancement mechanism contained in Nebraska's DUI statutes precludes application of the general enhancement provisions set forth in the habitual criminal statute.[26]

We further explained that "[o]ne can become a felon for driving under a suspended license only by having first committed multiple DUI offenses, at least some of which are misdemeanors, for which the license suspension was imposed."[27] Thus, we observed, "in a real sense, the penalty for this particular act has been enhanced by virtue of the defendant's prior violations of other provisions within the same statute."[28] Based on that reasoning, we concluded that a felony conviction for driving under a suspended license in violation of the DUI statutes could not be used to enhance a sentence under the habitual criminal statute.

[7] Ramirez argues that *Chapman* and *Hittle* are applicable here. But while some courts have extended "double enhancement" reasoning to situations involving enhancement of a sentence for being a felon in possession of a weapon,[29] the weight

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[25] See *id.*

[26] *Id.* at 355, 598 N.W.2d at 29.

[27] *Id.* at 356, 598 N.W.2d at 29.

[28] *Id.*

[29] See, e.g., *State v. Baker*, 970 So. 2d 948 (La. 2007); *Jackson v. Com.*, 650 S.W.2d 250 (Ky. 1983); *State v. Ware*, 201 Kan. 563, 442 P.2d 9 (1968); *State v. Haddenham*, 110 N.M. 149, 793 P.2d 279 (N.M. App. 1990); *Ramirez v. State*, 527 S.W.2d 542 (Tex. Crim. App. 1975); *State v. Smith*, 12 Ariz. App. 272, 469 P.2d 838 (1970).

of recent authority has established the rule that the use of a prior conviction to establish status as a felon and then enhance a sentence does not constitute impermissible double enhancement.[30] We find those decisions to be more persuasive and consistent with Nebraska law.

First, *Chapman* and *Hittle* both rest on the Legislature's specific intention in enacting the repeat offender enhancements of the DUI statutes, which are obviously not at issue here. And many courts that have rejected the use of a conviction to both establish status and enhance a sentence have done so, like this court in *Hittle* and *Chapman*,[31] because the status offense contained a specific penalty provision that would have been effectively nullified by the additional enhancement.[32] But that reasoning has been rejected when considering statutes that, like § 28-1206, do not expressly include their own sentencing provisions.[33] Other courts that have rejected the use of a conviction to both establish status and enhance a sentence have relied on the implicit statutory conflict that arose when, under their enhancement provisions, a single predicate conviction was sufficient to enhance the sentence for a second conviction.[34] But again, that reasoning is not applicable here, because under Nebraska law, a predicate conviction does not automatically prove the entire basis for enhancement of a sentence.[35]

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[30] See, e.g., *U.S. v. Bates*, 77 F.3d 1101 (8th Cir. 1996); *U.S. v. Wallace*, 889 F.2d 580 (5th Cir. 1989); *People v. Baird*, 12 Cal. 4th 126, 906 P.2d 1220, 48 Cal. Rptr. 2d 65 (1995); *Gholston v. State*, 620 So. 2d 719 (Ala. 1993); *Woodson v. State*, 302 Ark. 10, 786 S.W.2d 120 (1990); *Woods v. State*, 471 N.E.2d 691 (Ind. 1984); *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975); *Bailleaux v. Gladden*, 230 Or. 606, 370 P.2d 722 (1962); *State v. Crump*, 178 N.C. App. 717, 632 S.E.2d 233 (2006); *People v. Phillips*, 219 Mich. App. 159, 555 N.W.2d 742 (1996); *Fry v. State*, 655 P.2d 789 (Alaska App. 1983). Cf. *State v. Wardell*, 329 Mont. 9, 122 P.3d 443 (2005).

[31] *Hittle, supra* note 19; *Chapman, supra* note 18.

[32] See, e.g., *Baker, supra* note 29; *Ware, supra* note 29; *Smith, supra* note 29.

[33] See, *Bergstrom, supra* note 30; *Fry, supra* note 30.

[34] See, e.g., *Jackson, supra* note 29; *Ware, supra* note 29; *Smith, supra* note 29.

[35] See § 29-2221. See, also, *Bergstrom, supra* note 30, citing *Hollander v. Warden*, 86 Nev. 369, 468 P.2d 990 (1970); *Fry, supra* note 30.

Nor, under Nebraska law, are the predicates for §§ 28-1206 and 29-2221 necessarily coextensive. The predicate for violating § 28-1206 is a felony conviction, which may or may not result in the term of imprisonment of "not less than one year" necessary to establish a predicate for sentence enhancement under § 29-2221.[36] The fact that the predicates for §§ 28-1206 and 29-2221 are defined in different terms suggests that the same conviction can be used for both status and enhancement if that conviction meets the independent requirements of each statute.[37] Stated another way, the element of § 28-1206 to be proved is the fact of a prior felony conviction, while the element of § 29-2221 to be proved is a prior conviction resulting in a term of imprisonment of no less than 1 year. "The distinction between a prior felony conviction and a separate prison term served for such felony is obvious," and there is no statutory conflict or double enhancement where, as here, a fact (i.e., the service of a prior prison term) that is not integral or indispensable to an element of possession of a firearm by a felon (i.e., a prior felony conviction) is used to enhance the sentence.[38]

Most importantly, this case simply does not involve double penalty enhancement. There is a significant distinction between double enhancement, which involves the "stacking" of multiple enhancement provisions that this court rejected in *Chapman*,[39] and the use of a conviction to establish status and then enhance a sentence.[40] And under Nebraska law, possession of a firearm by a felon is simply a Class III felony,[41] with no indication that it should be treated differently from any other Class III felony for purposes of sentence enhancement. The habitual criminal statute is, admittedly, a sentence enhancement—a stiffened penalty for the latest crime which is considered to be an

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[36] See Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2006).

[37] See, *Baird, supra* note 30; *Gholston, supra* note 30.

[38] See *Baird, supra* note 30, 12 Cal. 4th at 132, 906 P.2d at 1224, 48 Cal. Rptr. 2d at 69. See, also, *Gholston, supra* note 30.

[39] *Chapman, supra* note 18.

[40] See, *Wallace, supra* note 30; *Wardell, supra* note 30; *Bailleaux, supra* note 30; *Crump, supra* note 30.

[41] § 28-1206(3)(b).

aggravated offense because it is a repetitive one.[42] Section 28-1206, however, is not a subsequent offense enhancement,[43] but a separate offense, enacted "'"to lessen 'a high potential of danger to the public' and to reduce the 'probability that the convicted individual would continue his criminal activity.' . . ."'"[44] Prohibiting a convicted felon from possessing a firearm neither punishes the felon for the underlying felony, nor enhances the sentence for another conviction—it is a new and separate crime of which the prior conviction is merely an element.[45]

As previously noted, the fundamental question in this double jeopardy analysis is one of legislative intent.[46] And it is apparent, from Nebraska's statutory scheme, that the Legislature intended for habitual criminals to be sentenced pursuant to § 29-2221, even when convicted of violating § 28-1206. The statutes define their necessary predicate elements using different standards. Possession of a firearm by a convicted felon is a Class III felony, with no statutory indication that it is meant to be treated differently from any other felony. In fact, § 28-105(3), which classifies felonies, specifically states that "[n]othing in this section shall limit the authority granted in sections 29-2221 and 29-2222 [(Reissue 1995)] to increase sentences for habitual criminals." And § 29-2221(1)(a) and (b) contain particular provisions for enhancing sentences for various crimes of violence, indicating that the Legislature has considered the implications of enhancing sentences for convictions under different statutes.

[8] Stated another way, there is no ambiguity in either § 28-1206 or § 29-2221, and Ramirez' arguments do not provide us with a compelling basis for disregarding clear statutory mandates. The Double Jeopardy Clause does not impose "a constitutional rule requiring courts to negate clearly expressed

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[42] *Addison, supra* note 17. Accord *Witte, supra* note 17.

[43] See *Hittle, supra* note 19.

[44] *Peters, supra* note 17, 261 Neb. at 423, 622 N.W.2d at 925.

[45] See *id.*

[46] See *Hunter, supra* note 13.

legislative intent."[47] Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, "'we may not manufacture ambiguity in order to defeat that intent.' . . . Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one."[48]

> Neither the habitual offender statute nor the felon in possession of a firearm statute prohibits the application of the statutory habitual offender sentence enhancement provision for a conviction of felon in possession of a firearm. Nor do these statutes expressly preclude a prior felony conviction that is used to establish the crime of felon in possession of a firearm from also being used as a prior conviction under the habitual offender statutes. . . . "Thus absent an absurd or unjust result, or one clearly inconsistent with the purposes and policies of the statutes involved, [this Court] would not be justified in concluding that the statutes' respective mutual use of a prior conviction" is prohibited.[49]

In short, where neither § 28-1206 nor § 29-2221 violates double jeopardy individually, there is no reason why they would offend the Double Jeopardy Clause when used in conjunction.[50] We reject Ramirez' claim that the Double Jeopardy Clause precluded the use of his 2000 marijuana conviction to establish his status as a felon for purposes of § 28-1206 and then enhance his sentence on that charge pursuant to § 29-2221. And because his sentence was lawful, he was not prejudiced by his trial counsel's failure to object on that basis. For those reasons, we find Ramirez' first assignment of error to be without merit.

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[47] *Id.*, 459 U.S. at 368.

[48] *Albernaz, supra* note 14, 450 U.S. at 342.

[49] *Phillips, supra* note 30, 219 Mich. App. at 163, 555 N.W.2d at 744 (citation omitted). See, also, *Gholston, supra* note 30; *Woods, supra* note 30.

[50] See *Bates, supra* note 30.

2. Motion to Suppress Evidence

Ramirez contends that trial counsel should have moved to suppress evidence obtained from the execution of a search warrant, because an "any time" warrant was not justified, and the police did not "knock and announce" their presence when serving the warrant. The district court found that Ramirez had not been prejudiced because a motion to suppress would have been without merit.

(a) Background

*(i) Trial Evidence*

The police investigation which led to the charges in this case began on June 10, 2004, when Melissa Bates called police and reported that she had been threatened at the home of Lucy Marlatt, where she was staying. Bates came in to the police department and made a report, along with Amber Troudt, Marlatt's daughter. Michael Cotant, an investigator with the Scotts Bluff County Sheriff's Department, interviewed Bates and Troudt and contacted the county attorney's office. Cotant secured a search warrant for Marlatt's residence, where Ramirez was also staying, and an arrest warrant for Ramirez.

In support of the application for the warrants, Cotant prepared two affidavits, in which he averred that Troudt and Bates had informed him they had seen Ramirez with drugs and drug paraphernalia. Cotant averred that Ramirez was a convicted felon and that Bates had seen Ramirez with a shotgun that he kept with him. Cotant also averred that Bates had reported that on June 2 or 3, 2004, Ramirez had pointed the shotgun at Bates and threatened to kill her.

The district court issued a search warrant at 11:42 p.m. on June 10, 2004. The court found probable cause for the search of Marlatt's residence "and that the public interest requires that this warrant be served at any time." Marlatt had already been detained at a grocery store and taken to the Scottsbluff Police Department, and Cotant served the warrant on her there. Police finally began conducting the search at approximately 3:30 a.m. The search revealed, among other things, a 12 gauge shotgun.

The commander of the Scottsbluff SWAT team testified that his unit was assigned to execute the search warrant. He

explained that his team had approached the house on foot from some distance away and had then attempted to determine where Ramirez was in the house. They were still outside the house when some dogs on the porch began barking, and Ramirez, who was inside the house, began yelling at the dogs to be quiet. The dogs kept barking, and Ramirez came to the front door. The commander challenged Ramirez, identified himself, and ordered Ramirez to show his hands and get down on the ground. Ramirez complied, and police handcuffed him and secured the residence.

*(ii) Postconviction Evidence*

Trial counsel testified that he had considered filing a motion to suppress, but decided not to when Ramirez informed him that the search had essentially taken place as described. Counsel said he had been advised by Ramirez that Ramirez had opened the front door when he heard his dogs barking and that when he had seen the police, he had stepped onto the patio and placed his hands behind his back to submit to the SWAT team commander. Counsel had not considered a "knock and announce" issue because Ramirez had opened the door before the police could knock. Counsel also explained that given the facts in the affidavit, he believed the court could have issued an "any time" warrant. Ramirez averred, in an affidavit admitted at the evidentiary hearing, that he had informed counsel that on the night of his arrest, he had been awakened by barking dogs and had actually opened the back door of the home.

(b) Analysis

For the reasons explained below, we agree with the district court's conclusion that a motion to suppress would have been meritless. Therefore, counsel was not ineffective in not filing such a motion, nor was Ramirez prejudiced by the alleged ineffectiveness.

*(i) Any Time Search*

[9,10] Neb. Rev. Stat. § 29-814.04 (Reissue 1995) provides in part that when a court issues a search warrant, "[t]he warrant shall direct that it be served in the daytime unless the magistrate or judge is satisfied that the public interest requires that

it should not be so restricted, in which case the warrant may direct that it may be served at any time." But an affidavit in support of a search warrant need not contain a separate statement of facts showing why the public interest requires that the warrant be served at night, in order for the nighttime search to be valid.[51] Instead, if the affidavit, read in a commonsense manner and as a whole, reasonably supports the inference that the interests of justice are best served by the authorization of nighttime service of a search warrant, provision for such service in the warrant is proper.[52]

Ramirez contends that the affidavit in his case did not set forth a sufficient factual basis for the issuance of an "any time" warrant. We disagree. The affidavit established that Ramirez used methamphetamine, had a shotgun and ammunition, kept the shotgun with him, and had threatened Bates with the shotgun. Thus, the affidavit provided information showing that the execution of the warrant at night, when speed and surprise could be accomplished, would serve to protect the safety of the officers involved. Because the search warrant properly authorized an "any time" search, Ramirez failed to prove counsel was ineffective, or that he was prejudiced, because counsel failed to challenge the warrant.

*(ii) Knock and Announce*

[11,12] Neb. Rev. Stat. § 29-411 (Reissue 1995) provides that in executing a search or arrest warrant, the executing officer

> may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance; or without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or

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[51] *State v. Fitch*, 255 Neb. 108, 582 N.W.2d 342 (1998). See, also, *State v. Paul*, 225 Neb. 432, 405 N.W.2d 608 (1987).

[52] *Peters, supra* note 17; *Fitch, supra* note 51; *Paul, supra* note 51.

> disposed of, or that danger to the life or limb of the officer or another may result, if such notice be given . . . .

This statute codifies the common-law requirement of knocking and announcing when serving a search warrant prior to breaking into a person's dwelling.[53] And the Fourth Amendment to the U.S. Constitution also requires, absent countervailing circumstances, that officers knock and announce their purpose and be denied admittance prior to breaking into a dwelling.[54]

In this case, the court did not issue a "no knock" warrant pursuant to § 29-411. But the record indicates that Ramirez opened the door, and surrendered to police, before they had an opportunity to knock and announce their presence. Although Ramirez averred that he stepped out the back door, rather than the front door, he does not contest the essential fact that he came out of the house before the police went in. In other words, Ramirez was aware of the presence of the police, and aware of their identity and purpose, before they entered the dwelling. Further identification would have been "'a useless gesture.'"[55] We agree with the district court that under these circumstances, the knock and announce rule was not violated.[56]

Because Ramirez' trial counsel did not perform deficiently in failing to object to the search of the residence, and Ramirez was not prejudiced, this assignment of error is without merit.

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[53] *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

[54] See *id.*, citing *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995).

[55] See *State v. Pierson*, 238 Neb. 872, 877, 472 N.W.2d 898, 901 (1991).

[56] Compare, e.g., *United States v. Remigio*, 767 F.2d 730 (10th Cir. 1985); *United States v. Lopez*, 475 F.2d 537 (7th Cir. 1973); *Wittner v. United States*, 406 F.2d 1165 (5th Cir. 1969); *United States v. Conti*, 361 F.2d 153 (2d Cir. 1966), *vacated on other grounds* 390 U.S. 204, 88 S. Ct. 899, 19 L. Ed. 2d 1035 (1968); *Belton v. U.S.*, 647 A.2d 66 (D.C. 1994); *State v. Alldredge*, 73 Wash. App. 171, 868 P.2d 183 (1994); *Woodward v. Com.*, 16 Va. App. 672, 432 S.E.2d 510 (1993); *People v Zuccarini*, 172 Mich. App. 11, 431 N.W.2d 446 (1988).

### 3. Failure to Object to Inadmissible Evidence, Adduce Favorable Evidence, and Impeach Witnesses at Trial

In his remaining three assignments of error, Ramirez raises several arguments with respect to trial counsel's decisions at trial. The district court rejected each of these arguments, either because they were reasonable strategic decisions made my counsel or because Ramirez was not prejudiced by them. Because Ramirez' arguments involve related testimony, it is easiest to consider them together.

#### (a) Background

##### *(i) Trial Evidence*

At trial, Bates testified that in May and June 2004, she was living in Marlatt's home near Minatare, Nebraska. At the time, a number of people were staying with Marlatt, including Bates and her daughters, Marlatt's daughters, and Ramirez. Bates testified that sometime during the week of June 7, Ramirez asked Bates to step outside so he could speak to her. Ramirez was upset, and Bates asked Ramirez what his problem was with her. Bates testified that Ramirez reached into his parents' vehicle, parked outside, and pulled out a double-barreled shotgun,

> [a]nd, he pointed it at my face at one point in time of the conversation, and I asked him if he was going to shoot me, and he screamed — he hollered a couple of things at me, me being a stupid bitch. And, then he pointed the gun above my head approximately an inch to two inches above my head and he shot off three rounds.

Bates identified the shotgun seized from the residence as the one Ramirez had brandished. In addition, the police found three expended shotgun shells in the driveway. Later, a witness identified the shotgun as one that he had received as a birthday present in 2003 and had sold to Ramirez in April 2004 for $200.

The amended information charged Ramirez with being in possession of a firearm "on or about the week of June 7, 2004." But Bates testified, without objection, that she had seen Ramirez with the shotgun before the incident and that he "carried it around quite a bit" and "would always have a gun with him." Bates also testified, without objection, that Ramirez often left the gun around the house and "shot the gun off a lot." Bates

was asked if Ramirez had made any other threats with the shotgun, and answered, without objection, that "he stated that if the police were going to come after him, that he wouldn't be taken into custody, he would kill them first."

Bates said that she was high at the time of the incident, and "didn't realize what was going on at the time," but reported the incident to police a couple of days later after she realized that Ramirez was dangerous. Ramirez' trial counsel cross-examined Bates regarding her history of drug use, and particularly her use of methamphetamine at the time of the incident. Counsel also questioned Bates about Ramirez' tone of voice during the incident, and when asked whether Ramirez had "scream[ed]" at Bates, Bates replied without objection, "No, he had the intent to frighten me." Ramirez' counsel responded by asking Bates whether she had studied law and to what extent she had prepared her testimony.

*(ii) Postconviction Evidence*

Ramirez' trial counsel was a deputy public defender with the Scotts Bluff County public defender's office, experienced in defending both misdemeanor and felony cases. Before joining the public defender, trial counsel had also been a prosecutor in Scotts Bluff County.

Trial counsel was asked, in his deposition, whether testimony that put Ramirez in possession of a firearm outside the charged timeframe of the week of June 7, 2004, was "something [he] would have wanted to object to." Counsel admitted that he "[i]n retrospect, probably" should have objected. Counsel explained that he did not believe the questions had been particularly objectionable, but "[w]ith 20/20 hindsight, watching the game film, yeah, maybe I'd have done a motion to strike." Counsel was also asked about impeaching Bates on cross-examination and explained that Bates was "crying on the stand, [and] had engendered, in my view, quite a bit of juror sympathy." Counsel explained that he believed Bates' testimony "had had doubt cast upon it significantly" and that he felt an objective fact finder would have found her testimony incredible.

Counsel also was questioned about statements in the affidavit supporting the search warrant, and in Marlatt's pretrial

deposition, indicating that Marlatt had asked Bates to leave the residence on the evening of June 9, 2004. Marlatt testified in her pretrial deposition that "the night [she] went to jail on the warrant," she had "kicked [Bates] out" of the house. Marlatt explained that she had become tired of Bates' being gone and leaving her 2-year-old daughter unattended, claiming to be pregnant, and using drugs and claiming to have had a miscarriage.

Trial counsel explained that he decided "not [to] use . . . Marlatt's testimony during trial concerning any kind of drug use because I believed the results would have been disastrous." Marlatt's deposition had also indicated that she had seen Ramirez with the shotgun and that she was aware of Ramirez' drug use. Marlatt also testified in her deposition that the breaking point with Bates had been that "she was telling me all these lies" including that "he had threatened her life."

(b) Analysis

[13,14] Ramirez argues that his trial counsel was deficient in several instances. For the reasons that follow, we conclude that each instance was either reasonable trial strategy by trial counsel or was not prejudicial to Ramirez. An appellate court will not second-guess reasonable strategic decisions by counsel.[57] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if they are found unreasonable, the error justifies setting aside the judgment only if there was prejudice.[58]

[15] Ramirez first complains that trial counsel did not object to Bates' testimony about Ramirez' possession of the shotgun outside the charged timeframe and several other incidental remarks Bates made. We note that where actual or constructive possession of a firearm by a felon is uninterrupted, as the evidence suggests it was here, it constitutes a single offense.[59] But even if some of Bates' testimony was irrelevant, it was not prejudicial. There was no reason for the jury to find Bates' testimony credible on those subjects, but incredible with respect

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[57] *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004).

[58] See *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

[59] See *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982).

to her testimony about the incident for which Ramirez was convicted. If the jury believed Bates—which it obviously did—then her testimony about that incident alone would leave little alternative but to find Ramirez guilty. In short, Ramirez has not demonstrated a reasonable probability that had counsel objected to Bates' allegedly irrelevant testimony, the result of the proceeding would have been different.[60]

Ramirez argues that trial counsel should have done more to impeach Bates. For example, Ramirez contends that Marlatt could have testified about evicting Bates from her residence, about giving Bates a motive to lie, and about Bates' character for untruthfulness. But adducing that testimony would have opened the door to Marlatt's testimony, suggested in her deposition, that Bates was evicted in part because she reported to Marlatt that Ramirez had threatened Bates' life. Given that, it is evident that counsel made a reasonable strategic decision in not adducing the testimony. Ramirez also argues that Bates should have been cross-examined about alleged inconsistencies between her trial testimony and the police affidavits used to support the search and arrest warrants. Having reviewed the record, we are not convinced that they are as inconsistent as Ramirez asserts, and we conclude that Ramirez was not prejudiced by counsel's failure to use the affidavits on cross-examination.

Ramirez' brief also takes issue with several other alleged failures of trial counsel. We have reviewed the record and find each instance identified by Ramirez to be incidental. In each instance, Ramirez failed to demonstrate a reasonable probability that absent counsel's alleged deficiency, the result of the proceeding would have been different.

In short, Ramirez has failed to demonstrate that any of the alleged deficiencies in trial counsel's performance deprived Ramirez of effective assistance of counsel. We find no merit to Ramirez' remaining assignments of error.

## V. CONCLUSION

For the foregoing reasons, the district court did not err in rejecting Ramirez' claim of ineffective assistance of counsel

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[60] See *Sims, supra* note 7.

and denying his motion for postconviction relief. The judgment of the district court is affirmed.

AFFIRMED.

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STEVEN L. ARCHBOLD, SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF ALPHONS REIFENRATH, DECEASED, APPELLEE, V. JOSEPH F. REIFENRATH AND DONNA REIFENRATH, APPELLANTS.

744 N.W.2d 701

Filed January 25, 2008. No. S-06-1124.

1. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Principal and Agent.** A power of attorney is an instrument in writing authorizing another to act as one's agent.
3. ____. An agent holding a power of attorney is termed an "attorney in fact" as distinguished from an attorney at law.
4. ____. An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act.
5. ____. An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.
6. **Agency: Principal and Agent.** Because of the agency relationship created by a power of attorney, the authority and duties of an attorney in fact are governed by the principles of the law of agency, including the prohibition against an agent profiting in transactions in which the agent represents the principal.
7. **Principal and Agent.** Powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted.
8. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
9. **Prejudgment Interest.** Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004).
10. ____. Under Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004), prejudgment interest is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to the plaintiff's right to recover and the amount of such

recovery. This determination requires a two-pronged inquiry. There must be no dispute as to the amount due and to the plaintiff's right to recover.

Appeal from the District Court for Cedar County: WILLIAM BINKARD, Judge. Affirmed.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law Group, P.C., L.L.O., for appellants.

Thomas H. DeLay, of Jewell, Collins, DeLay & Flood, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

Steven L. Archbold, successor personal representative of the estate of Alphons Reifenrath, brought the present action against Joseph F. Reifenrath and his wife, Donna Reifenrath (collectively the appellants), to recover assets formerly belonging to Alphons. The district court found that Joseph, while acting as Alphons' power of attorney (POA), did not have authorization to make substantially gratuitous transfers of Alphons' assets to himself and members of his family. The district court further found that any oral authorization by Alphons for Joseph to make such transfers was the result of undue influence exercised by Joseph. The appellants now appeal.

## BACKGROUND

Alphons was diagnosed with terminal cancer in August 2002 and died shortly thereafter on November 1, 2002. Alphons was a bachelor and was survived by one brother, Joseph; one sister, Angela Gubbels (Angela); and his nieces and nephews. Alphons was preceded in death by his parents and seven sisters, including a sister named "Beatrice Walter" (Beatrice). Alphons had lived alone on his farm for a number of years prior to his diagnosis. Following his diagnosis, however, Alphons resided in a nursing home until his death.

During his life, Alphons owned various parcels of real estate, some of which he retained in his name as sole owner and some of which he sold to Joseph. In addition, prior to September 2002, Alphons owned various bank accounts and certificates of deposit. The account number, owner, title of the account, and ending balance for the bank accounts at issue, as well as the certificate number, owner, amount, and payee or payable-on-death (POD) beneficiary for the relevant certificates of deposit are as follows:

| **Account No.** | **Owner** | **Titled As** | **Closing Balance** |
|---|---|---|---|
| 491705 | Alphons | Alphons or Beatrice | $2,446.93 |
| 738536499 | Alphons | Alphons or Angela | 5,100.49 |
| **Certificate No.** | **Owner** | **Amount** | **Payee** |
| 15466 | Alphons | $ 6,700.30 | POD Angela |
| 32064 | Alphons or Beatrice | 45,000.00 | Survivor |
| 15630 | Alphons | 65,397.53 | POD Angela and Beatrice |
| 2108332046 | Alphons and Angela | 50,040.75 | Survivor |

Angela testified by deposition that prior to his death, Alphons informed her that she was the beneficiary of a number of certificates of deposit and checking accounts and that upon his death, she was to distribute the proceeds to Alphons' estate for distribution among the siblings.

Around the time Alphons was admitted into the nursing home, Joseph contacted his attorney, Alice Rokahr, who drafted a durable POA which was signed by Alphons. Under the POA, Joseph was appointed Alphons' attorney in fact and was given plenary powers as well as all the specific and general powers set forth in the Nebraska Short Form Act (the Act), Neb. Rev. Stat. § 49-1501 et seq. (Reissue 1998). At trial, Rokahr testified, over a continuing objection by Archbold's attorney on the basis of parol evidence, that she explained to Alphons that the document would give Joseph the right to stand in Alphons' shoes, that Joseph could do anything Alphons could do, and

that "this was a full power with no limits." In admitting this testimony, the court stated:

> I'm inclined to let it come in. But as far as the fact finding of whether [Alphons'] understanding varies with what he signed, or whether I believe it, that's another matter. So I'm going to let it come in. The objection is overruled. It's going to be for the weight that I place on it.

Rokahr also prepared an updated will for Alphons, which was signed by Alphons and witnessed on September 17, 2002. Joseph was appointed personal representative of the will. In the will, Alphons directed that any property in his name and another as joint tenant or beneficiary at the time of his death be paid to such joint owner or beneficiary and that the personal representative make no claim thereto. Alphons directed that all certificates of deposit be cashed by the personal representative and be divided equally among his beneficiaries. He directed that the personal representative sell Alphons' real estate, preferably to a family member, and distribute the proceeds in equal parts to his residuary beneficiaries. Alphons also directed that his personal property be distributed as the personal representative saw fit and that his farm machinery and equipment be sold and the proceeds be equally distributed to his residuary beneficiaries. Alphons left the residue and remainder of his estate, including all cash, equally to Joseph and the children of five of his sisters.

Following his appointment as Alphons' attorney in fact, Joseph deleted the names of Alphons' sisters as joint owners or POD beneficiaries on a number of Alphons' deposit accounts and certificates of deposit, and inserted his own name as either the joint owner or POD beneficiary for nearly all those assets. Following Alphons' death, Joseph closed the two deposit accounts for which he had substituted himself as joint owner and deposited the balances into his personal accounts. The inventory filed by Joseph as personal representative identified the account balances as "Jointly Owned Property," with Joseph as the surviving joint owner. Prior to Alphons' death, Joseph also drew checks upon Alphons' deposit accounts in the amounts of $65,000, $15,000, $10,000, and $1,000. These checks were all payable to Donna.

With regard to Alphons' certificates of deposit, certificate 15466 was redeemed by Joseph in October 2002, certificate 32064 was cashed in December 2002, and certificate 2108332046 was redeemed in December 2002. The proceeds of these certificates were deposited into accounts owned by either Joseph or the appellants jointly. With regard to certificate 15466, Joseph testified that he used the proceeds from the certificate to pay his personal debt that had accumulated from working with Alphons over the years. With regard to certificate 2108332046, Joseph claimed that he used the proceeds of the certificate to pay a personal debt to reimburse expenses he had accrued while farming with Alphons.

In addition, while acting as attorney in fact, Joseph participated in the sale of Alphons' farm to Joseph's son and daughter-in-law for $115,000. Joseph testified that Alphons agreed to sell his farm to Joseph's son. Joseph drafted the deed, as well as a note for the $115,000 consideration. Joseph claimed that Alphons orally authorized the drafting of the note. The payees of the note were identified as Alphons or Joseph or Donna. The appellants received the payoff of the note in full on July 14, 2004. That amount was not paid into the estate; rather, it was used for the appellants' sole use and benefit.

Archbold, successor personal representative of Alphons' estate, filed suit against the appellants. Archbold alleged that Joseph abused his fiduciary duty as Alphons' attorney in fact by making gifts to himself and his family. Archbold alleged that the appellants wrongfully retained funds from Alphons' estate, commingled funds from Alphons or Alphons' estate, paid personal debts with those funds, and purchased property with those funds. Archbold further alleged that Joseph exercised undue influence over Alphons and that the appellants wrongfully took property from Alphons and Alphons' estate.

The principal issue before the district court was the question of whether Joseph, as attorney in fact for Alphons, was authorized to make substantial gifts of Alphons' funds to himself and his family. The district court found in part that the principles of agency apply to the construction of a POA and supplement the Act. The district court concluded that neither the POA in this case, nor the general powers and plenary power of the

Act, expressly granted Joseph the authority and power to make substantial gifts of Alphons' property and funds to himself and his family, including Donna. The district court found that there was clear and convincing evidence of constructive fraud. The district court further found that there was clear and convincing evidence of Joseph's motive and intent to unduly influence Alphons during the last days of Alphons' life. The district court found that if Alphons actually gave oral authorization for Joseph to insert his name as joint payee or POD beneficiary on the above-noted deposit accounts and certificates of deposit and authorized the drafting of the promissory note payable to Alphons and the appellants as joint tenants, such authority was the product and result of undue influence exercised by Joseph upon Alphons. The court held that the amounts taken from Alphons' deposit accounts and certificates of deposit accounts, which are noted above, should be returned to Alphons' estate, as well as the proceeds from the sale of Alphons' farm. The court found that based upon the evidence, no reasonable controversy existed as to the amount of damages or the time when the cause of action arose, i.e., the time when Joseph received the moneys and held that prejudgment interest should be assessed against the appellants.

The district court also addressed in its order the admissibility of Rokahr's testimony, which was objected to at trial on the basis of the parol evidence rule. In its order, the district court found that although the objection was overruled, if the testimony was offered as proof of the matter stated, then such expression of intent was inadmissible under the parol evidence rule.

## ASSIGNMENTS OF ERROR

The appellants contend, renumbered, that the district court erred (1) in finding Joseph unduly influenced Alphons to make certain gifts or transfers of certificates of deposit, (2) in setting aside the promissory note payable to the appellants, (3) in deciding that the Act does not eliminate the need for express authority for an attorney in fact to convey assets to himself, (4) in refusing to admit Rokahr's testimony, and (5) in awarding Archbold prejudgment interest.

## STANDARD OF REVIEW

[1] In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[1]

## ANALYSIS

### Joseph Was Not Authorized to Make Substantially Gratuitous Transfers of Alphons' Property to Himself and Members of His Family

The appellants' first three assignments of error can be consolidated into one broad question: Does the plenary power in the Act change the rule with regard to the fiduciary duty that an agent owes to the principal?

[2–5] We have defined a power of attorney as "'an instrument in writing authorizing another to act as one's agent.'"[2] An agent holding a power of attorney is termed an "attorney in fact" as distinguished from an attorney at law.[3] An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act.[4] An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.[5]

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[1] *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989).

[2] *Id.* at 858, 448 N.W.2d at 581. See, also, *First Colony Life Ins. Co. v. Gerdes*, 267 Neb. 632, 676 N.W.2d 58 (2004).

[3] *First Colony Life Ins. Co. v. Gerdes, supra* note 2; *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003).

[4] *First Colony Life Ins. Co. v. Gerdes, supra* note 2.

[5] *Id.*

[6] As stated in *Fletcher v. Mathew*,[6] because of the agency relationship created by a power of attorney, the authority and duties of an attorney in fact are governed by the principles of the law of agency, including the prohibition against an agent profiting in transactions in which the agent represents the principal. We explained in *Crosby v. Luehrs*[7] that no gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument and there is shown a clear intent on the part of the principal to make such a gift. Thus, absent an express intention, an agent may not use his or her position for the agent's or a third party's benefit in a substantially gratuitous transfer.[8] An attorney in fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney in fact engaging in an interested transaction after full disclosure.[9]

Accordingly, we have determined that in situations involving an attorney in fact,

> a prima facie case of fraud is established if the plaintiff shows that the defendant held the principal's power of attorney that the defendant, using the power of attorney, made a gift to himself or herself. . . . The burden of going forward under such circumstances falls upon the defendant to establish by clear and convincing evidence that the transaction was made pursuant to power expressly granted in the power of attorney document and made pursuant to the clear intent of the donor.[10]

In *First Colony Life Ins. Co. v. Gerdes*,[11] we stated that in situations involving an attorney in fact, a principal's purported oral authorization is ineffective as proof of the principal's intent

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[6] *Fletcher v. Mathew, supra* note 1.

[7] *Crosby v. Luehrs, supra* note 3.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 836, 669 N.W.2d at 645. See, also, *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992); *Fletcher v. Mathew, supra* note 1.

[11] *First Colony Life Ins. Co. v. Gerdes, supra* note 2.

to make a substantially gratuitous transfer. We explained that this rule "was enunciated out of concern for potential abuse and fraud with durable powers of attorney and has been limited in application to cases in which the attorney in fact, or someone in relationship to the attorney in fact, stood to benefit at the principal's expense."[12] The appellants rely on Alphons' alleged oral authorizations and the POA as Joseph's authority for making gifts to himself and members of his immediate family. Because Alphons' alleged oral authorizations are ineffective as proof of Alphons' intent, the POA in this case would have to provide Joseph with the express authority to make such gratuitous transfers.

The appellants contend that the POA in this case, which was patterned after the Act, conferred plenary power upon Joseph. The appellants assert that included in that power was the authority to personally acquire property from Alphons and to convey Alphons' property to any person, including Joseph and members of his family. The appellants further assert that nothing in the Act limits an attorney in fact's authority to transfer property to himself or herself or family.

[7] Powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted.[13] The POA in this case provides in relevant part:

> 1. **Durability**: By this instrument, I create and establish a durable and general Power of Attorney upon the following principals:
>
> a. The authority and power within the scope of this instrument derive their validity from and compromise [sic] and constitute a durable Power of Attorney under the provisions and within the meaning of Section 30-2664 through 2672, reissue revised statutes of Nebraska, 1995, as amended, and all other applicable provisions of the Nebraska Uniform Durable Power of Attorney Act, as amended, and the Nebraska Probate Code, as amended; and the short form expressions herein used have the meanings ascribed by and are respectively subject to application,

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[12] *Id.* at 640, 676 N.W.2d at 65.

[13] *Fletcher v. Mathew*, *supra* note 1.

> construction, enforcement and interpretation as prescribed under the provisions of Sections 49-1501 through 1561, reissue revised statutes of Nebraska, 1998, as amended, and all other applicable provisions of the Nebraska Short Form Act. . . .
>
> 2. **Enumerated Powers**: By this instrument, I confer upon and grant to my power of attorney without limitation to the generality, Plenary Power exercisable in the absolute judgment and discretion of my Agent. This shall include, but not be limited to the following authority, to wit: . . . .

The POA goes on to specify all those general and specific powers and authorities contained in the Act. Included is the specific authority for dispositions,[14] the specific authority for documents,[15] the specific authority for investments,[16] the general power for bank and financial transactions,[17] and the general power for real estate.[18]

The Act defines a general power as "any one of the separate general aggregations of related authorities and powers defined by any short form expression specified by the . . . Act."[19] Plenary power is defined by the Act as "the general and universal aggregation of authorities and powers defined by the short form expression specified by the . . . Act."[20] The Act further provides that plenary power "shall mean that the principal generally and universally authorizes and empowers the agent to have and to exercise collectively or singly and concurrently or consecutively any one or more in combination or otherwise of each" of the general power.[21] The Act provides that plenary power shall mean that

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[14] See § 49-1532.

[15] See § 49-1533.

[16] See § 49-1537.

[17] See § 49-1545.

[18] See § 49-1554.

[19] § 49-1512.

[20] § 49-1515.

[21] § 49-1557.

> the principal generally and universally authorizes and empowers the agent to act as and to be an alter ego of the principal as to anything and everything not otherwise fully within the scope of such enumerated general powers and to the full extent permissible and practicable for any person as an agent to do or omit to do for, in place of, or on behalf of another person as a principal and without reservation or restriction as to any circumstance, condition, interest, matter, property, question, or transaction as the principal might do or omit to do in person and while competent.[22]

The appellants argue that under the plenary power bestowed upon Joseph, Joseph was expressly provided the authorization to make substantially gratuitous transfers of Alphons' property to himself and his family. The appellants misconstrue the breadth of plenary power under the Act. Section 49-1557 provides that plenary power authorizes the agent to act as the principal's alter ego. Notably, § 49-1557 limits plenary power to those acts an agent is otherwise authorized to do as an agent. As explained above, our case law on the subject has made clear that an agent is not authorized to make substantially gratuitous transfers to himself or his family absent an express provision in the POA. Because the POA in this case does not contain a specific authorization for the making of gratuitous transfers by Joseph to himself or his immediate family, we determine that Joseph has failed to meet his burden. We, therefore, affirm the district court's findings. Specifically, we determine that Joseph was not authorized to transfer the funds from Alphons' bank accounts to himself or Donna. We further determine that Joseph was not authorized to retain the proceeds from the certificates of deposit noted above. As for the real estate sold to Joseph's son, Alphons directed in his will that his real estate be sold, preferably to a family member. Joseph did that by selling the property to his son. We determine, however, that the proceeds of that sale should not have been retained by the appellants. Rather, the proceeds should have been remitted to Alphons' estate.

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[22] *Id.* (emphasis supplied).

### ROKAHR'S TESTIMONY

We have examined the appellants' fourth assignment of error with regard to Rokahr's testimony, and we find this assignment of error to be without merit.

### PREJUDGMENT INTEREST

[8] In their final assignment of error, the appellants contend that the district court erred in awarding prejudgment interest. Whether prejudgment interest should be awarded is reviewed de novo on appeal.[23]

[9,10] Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004).[24] Under § 45-103.02(2), prejudgment interest is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to the plaintiff's right to recover and the amount of such recovery. This determination requires a two-pronged inquiry. There must be no dispute as to the amount due and to the plaintiff's right to recover.[25]

The district court determined that no reasonable controversy existed as to the amount of damages. The appellants do not dispute this determination. The appellants do, however, argue that a reasonable controversy existed regarding Joseph's rights to retain Alphons' assets. We disagree. Based on our analysis above, we conclude that a reasonable controversy did not exist as to Joseph's rights to retain Alphons' assets. We, therefore, affirm the district court's judgment on this issue.

## CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

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[23] *Travelers Indemnity Co. v. International Nutrition*, 273 Neb. 943, 734 N.W.2d 719 (2007).

[24] See *id.*

[25] See *id.*

# JAMES E. RISOR, APPELLEE, V. NEBRASKA BOILER, APPELLEE, AND TWIN CITY FIRE INSURANCE CO., APPELLANT.

744 N.W.2d 693

Filed January 25, 2008. No. S-07-269.

1. **Interventions.** Whether a party has the right to intervene in a proceeding is a question of law.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Insurance: Parties.** The employer's workers' compensation insurer is a proper party defendant in a workers' compensation action, but it is not a necessary party to the action.
5. **Interventions.** It is a general principle that intervention is not authorized after trial.
6. **Workers' Compensation: Equity: Jurisdiction.** No Nebraska statute grants equity jurisdiction to the Workers' Compensation Court.
7. **Workers' Compensation: Intent.** The principal purpose of the Nebraska Workers' Compensation Act is to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease.
8. **Due Process: Words and Phrases.** Due process defies precise definition, but it embodies and requires fundamental fairness.
9. **Due Process: Notice.** Due process requires notice and an appropriate opportunity to be heard when a significant property interest has been shown.
10. **Due Process: Judgments: Parties.** It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.
11. **Actions: Parties.** Privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same.

Appeal from the Workers' Compensation Court. Affirmed.

Joseph W. Grant, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellant.

Brenda Spilker and Cynthia R. Lamm, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Nebraska Boiler.

Martin V. Linscott, of Linscott Law Office, for appellee James E. Risor.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

Twin City Fire Insurance Co. (Twin City) appeals from the denial of its motion to intervene in a workers' compensation action while the appeal to the review panel of the underlying award is pending. Although the review panel recognized that, through error, Twin City had only recently been notified of the action, it concluded that it lacked authority to grant the motion to intervene.

## BACKGROUND

James E. Risor filed his petition in the Nebraska Workers' Compensation Court on January 20, 2004. Risor alleged bilateral hearing loss from exposure to a loud work environment at his employer, Nebraska Boiler. The accident date for the hearing loss was alleged to be on or about June 25, 2002. The petition also claimed various other injuries from work-related accidents in 2002 and 2003.

In the proceedings before the single judge of the compensation court, Fireman's Fund Insurance Company (Fireman's Fund) entered an appearance for Nebraska Boiler for the coverage period of September 1, 1992, through June 1, 2002. Another insurance company represented Nebraska Boiler for the period after June 2002. The evidence presented before the single judge demonstrated that Risor began experiencing hearing loss as early as 1988. Until his retirement, however, the only time that Risor missed any work due to the bilateral hearing loss was when he went to a doctor's appointment on October 19, 1993.

In its award entered on April 26, 2006, the single judge concluded that Risor was permanently and totally disabled as a result of the hearing loss arising out of and in the course of his employment with Nebraska Boiler. The accident date for the hearing loss was determined to be October 19, 1993. The single judge found that compensation for the other alleged injuries had already been paid. Payment for the total permanent disability was ordered to begin as of the date of Risor's retirement, February 12, 2004.

An adjuster for Fireman's Fund was sent notice of the award. This same adjuster had originally informed Fireman's Fund's attorney, who was hired to represent Nebraska Boiler, that Fireman's Fund provided workers' compensation coverage for Nebraska Boiler from September 1, 1992, through June 1, 2002. But when the adjuster was notified of the award setting the date of the hearing loss injury at October 19, 1993, she decided to investigate further into the dates of coverage.

Fireman's Fund provided coverage for Nebraska Boiler under a corporate account with the company Aqua Chem, in which any subsidiary companies acquired by Aqua Chem automatically became "additional named insureds." Nebraska Boiler was owned by Aqua Chem at the time Risor's claim was filed. The adjuster had apparently assumed that Nebraska Boiler was owned by Aqua Chem during the entire period of Aqua Chem's contract with Fireman's Fund. After the award, the adjuster discovered that, in fact, Aqua Chem did not acquire Nebraska Boiler until June 23, 1998. Accordingly, contrary to its representations to the single judge, Fireman's Fund was not Nebraska Boiler's workers' compensation insurer on the date of Risor's hearing loss injury.

The award had already been entered when Nebraska Boiler learned that Fireman's Fund was not its insurer on the date of Risor's injury. Nevertheless, Nebraska Boiler, "as its interests appear through June 1, 2002," filed a motion with the single judge seeking a continuation of the proceedings and allowing that "additional parties who may have an exposure to liability once a final determination has been made" be served and given an opportunity to present additional evidence to the court. Risor appealed the award to the review panel on May 9, 2006, on the ground that the single judge had failed to order compensation from the date of his injury, as opposed to the date of his retirement. On May 10, the single judge overruled Nebraska Boiler's motion, and Nebraska Boiler cross-appealed the underlying award to the review panel. Nebraska Boiler's cross-appeal asserted various errors with the award, including the absence of participation by the insurer for the time period of the accident. Risor's appeal and Nebraska Boiler's cross-appeal of the award

are still pending before the review panel and are not at issue in this appeal.

It was eventually discovered that Nebraska Boiler's insurer for the period of August 1, 1991, to August 1, 1998, was Twin City. Twin City insured Nebraska Boiler through a contract with its previous parent company, National Dynamics Corporation. Twin City was informed of Risor's claim on August 1, 2006. On October 25, 2006, Twin City filed with the review panel a motion for leave to intervene in Risor's pending review proceeding, which is the subject of the present appeal. The motion stated in part:

> 4. If allowed to intervene, [Twin City] will seek a reversal of the Award of April 26, 2006, and a remand for a new trial. If [Twin City] is not given an opportunity to intervene, fundamental principles of law will be violated, in that it will face significant exposure under the Nebraska Workers' Compensation Act, without having had the opportunity to even be heard on the issues herein.
>
> 5. [Twin City] respectfully notes that its insured has at all times been the only named Defendant herein, and that perhaps [Twin City] could simply have its counsel enter an appearance herein. However, as [Twin City] has not participated in this action to date in any way, this Motion is being filed to seek to have [Twin City's] right to participate in any further proceedings recognized.

The review panel denied Twin City's motion to intervene, noting that there was no statutory authority for such action and that the compensation court lacked equitable powers. Twin City appeals.

## ASSIGNMENT OF ERROR

Twin City asserts that the review panel erred as a matter of law in refusing to grant Twin City's request for leave to intervene.

## STANDARD OF REVIEW

[1-3] Whether a party has the right to intervene in a proceeding is a question of law.[1] The determination of whether the

[1] *Merz v. Seeba*, 271 Neb. 117, 710 N.W.2d 91 (2006).

procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[2] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[3]

## ANALYSIS

The only issue in this case is whether Twin City had a right to intervene in the appeal of the award to the review panel when Twin City had no notice of Risor's action prior to that time. For reasons that will be explained further below, we conclude that Twin City did not have a right to postaward intervention in Risor's workers' compensation action brought solely against his employer, Nebraska Boiler.

[4] We have said that the employer's workers' compensation insurer is a proper party defendant in a workers' compensation action, but that it is not a necessary party to the action.[4] Both the Nebraska Workers' Compensation Act (the Act)[5] and the rules of the compensation court are silent on the issue of intervention. And, as Risor points out, the compensation court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.[6]

Twin City, however, argues that the power to allow its intervention should be inferred from § 48-168(1) and the beneficent purposes of the Act.[7] Most often, § 48-168(1) is cited for the proposition that within the confines of the Due Process Clause, the compensation court has flexibility in the admission and

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[2] *Newman v. Rehr*, 263 Neb. 111, 638 N.W.2d 863 (2002).

[3] *Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007).

[4] *Peek v. Ayers Auto Supply*, 157 Neb. 363, 59 N.W.2d 564 (1953).

[5] Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2004 & Cum. Supp. 2006).

[6] See *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991).

[7] See § 48-168(1).

consideration of evidence relating to the employee claim.[8] This is clearly the focus of § 48-168(1), which states in full:

> The Nebraska Workers' Compensation Court shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act.

Nevertheless, Twin City points out that the Act is generally to be given a liberal construction in order to carry out justly its beneficent purposes.[9] And thus, Twin City argues that § 48-168(1) should be construed to allow postaward intervention by an insurer despite the fact that no other provision specifically grants this power.

[5,6] We are unconvinced that either § 48-168(1) or the Act's beneficent purposes, either alone or in conjunction with one another, authorize a postaward intervention of the insurer in this case. It is a general principle that intervention is not authorized after trial.[10] When posttrial intervention has been authorized in the district courts of Nebraska, it is in the exercise of the court's equity jurisdiction.[11] But no Nebraska statute grants equity jurisdiction to the compensation court.[12]

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[8] See, e.g., *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007); *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004); *Cunningham v. Leisure Inn*, 253 Neb. 741, 573 N.W.2d 412 (1998); *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

[9] See, *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005); *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003); *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

[10] See Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006). See, also, e.g., *Diaz v. Attorney General of State of Tex.*, 827 S.W.2d 19 (Tex. App. 1992); *Jenkins v. Pullman Std. Car Mfg. Co.*, 128 Ind. App. 260, 147 N.E.2d 912 (1958).

[11] See, e.g., *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 115 N.W.2d 796 (1962). See, also, *Meister v. Meister, ante* p. 705, 742 N.W.2d 746 (2007).

[12] *Anthony v. Pre-Fab Transit Co., supra* note 6.

[7] The beneficent purposes of the Act do not concern themselves with an insurer's interests in intervention. In fact, there is no provision in the Act that even requires notification of the workers' compensation insurer that an action against its insured is pending. The principal purpose of the Act is to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease.[13] That purpose is not implicated by an insurer's intervention in a review proceeding.

Still, Twin City argues that it is this interest of the employee that is furthered by its intervention because, otherwise, a potential multiplicity of suits could delay recovery on an award. This same argument was rejected by the court in *Milner v. 250 Greenwood Ave. Corp.*[14] In *Milner*, the employee brought his workers' compensation action against his employer and did not implead the employer's insurer. The insurer then sought to be designated as a party on appeal, arguing that this would avoid circuity and multiplicity of actions. But the court explained that the employee had chosen not to make the insurer a party in order to avoid complicating and prolonging a judgment against his employer:

> [I]t is clear that the only issue properly before [the workers' compensation court] was the liability of the employing corporation as the sole respondent. Under the petition as drawn and prosecuted petitioner's purpose in instituting these proceedings was to establish his right under the provisions of the act to recover compensation *directly from the employer.* For the attainment of that end it was immaterial to him who, as between the employer and its insurer or insurers, was ultimately chargeable with the payment of compensation for his incapacity. In such a situation it would be an unreasonable burden to impose upon him the necessity of foregoing [sic] the protection of the act until it was finally decided whether one or the other of respondent's insurers, who were not parties

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[13] See, *Soto v. State*, *supra* note 9; *Jackson v. Morris Communications Corp.*, *supra* note 9.

[14] *Milner v. 250 Greenwood Ave. Corp.*, 78 R.I. 5, 78 A.2d 358 (1951).

in the case, was ultimately chargeable with the payment of compensation.[15]

We have said that proceedings under the Act are designed to furnish a special proceeding, summary and speedy in its nature, and for the particular purpose of compensating an injured employee.[16] While, under § 48-161, the compensation court *may* determine the existence of insurance, such jurisdiction is not exclusive.[17] We agree with the reasoning in *Milner* that joining an insurer and deciding coverage disputes may hinder rather than further the beneficent purposes of the Act. As such, we cannot interpret § 48-161 as authority for postaward intervention when the employee has chosen to bring a claim against the employer alone.

[8-10] We next consider Twin City's argument that principles of procedural due process mandate its participation in the compensation proceedings. We have said that the concept of due process defies precise definition, but that it embodies and requires fundamental fairness.[18] Due process requires notice and an appropriate opportunity to be heard when a significant property interest has been shown.[19] The U.S. Supreme Court has stated, "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."[20]

Section 48-146(3) provides that each workers' compensation policy shall contain a clause providing that the insurer "shall in all things be bound by the awards, judgments, or decrees rendered against such insured." And we have explained that this section's intent is to bind insurers to judgments rendered against

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[15] *Id.* at 10, 78 A.2d at 361 (emphasis in original).

[16] *Hull v. United States Fidelity & Guaranty Co.*, 102 Neb. 246, 166 N.W. 628 (1918).

[17] See *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999).

[18] See *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[19] *Newman v. Rehr, supra* note 2.

[20] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979).

their insureds.[21] We thus agree that Twin City's interests may be affected by the proceedings against its insured, Nebraska Boiler. Nevertheless, we conclude that because Nebraska Boiler and Twin City are in privity with one another, due process does not compel Twin City's intervention in the review proceedings.

[11] Privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same.[22] Absent a showing of fraud or collusion, courts in other jurisdictions have found insurers to be in privity with their insureds and bound by a judgment against the insured, regardless of whether the insurer was notified of the underlying action.[23] Thus, in *Harp v. Loux*,[24] the court rejected a defendant insurer's argument that due process demanded that a default judgment in a tort action against the defendant be set aside because the insurer was not notified of the action. The court explained:

> The difficulty with [the defendant insurer's] argument is that the insurer's legal interest in the action is wholly derivative of the defendant's . . . . It may be true that, in fact, the insurer's money and not the defendant's is on the table; however, the judgment runs against the defendant and not the insurer.[25]

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[21] *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990); *Collins v. Casualty Reciprocal Exchange*, 123 Neb. 227, 242 N.W. 457 (1932); *Home Indem. Co. v. King*, 34 Cal. 3d 803, 670 P.2d 340, 195 Cal. Rptr. 686 (1983); *Bernard v. Aetna Ins. Co.*, 150 So. 305 (La. App. 1933); *Power Co. v. General C. & S. Co.*, 252 Mich. 331, 233 N.W. 333 (1930); *Equitable Underwriters v. Industrial Com.*, 322 Ill. 462, 153 N.E. 685 (1926).

[22] *R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002).

[23] See, *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 89 P.3d 573 (2004); *Cincinnati Ins. Co. v. MacLeod*, 259 Ga. App. 761, 577 S.E.2d 799 (2003); *Liberty Mut. Ins. Co. v. Eades*, 248 Va. 285, 448 S.E.2d 631 (1994). Cf., *R.W. v. Schrein, supra* note 22; *Northern Sec. Ins. Co., Inc. v. Dolley*, 669 A.2d 1320 (Me. 1996).

[24] *Harp v. Loux*, 54 Or. App. 840, 636 P.2d 976 (1981).

[25] *Id.* at 848, 636 P.2d at 981 (emphasis omitted).

Moreover, the court explained, insurers normally include notice provisions in their contracts with the insureds, and it was "not readily apparent why a plaintiff injured by an insured should be required to protect the insurer from the consequences of the insured's failure to comply with the policy."[26] The court noted that the defendant could find "no case holding that an insurer that is not a party has a due process right to service or notice of an action in which its insured is a defendant."[27] Similar reasoning has been applied more specifically to due process claims of workers' compensation insurers—even when the insurer was required to maintain policy provisions like those set forth by § 48-146(3).[28]

In the case currently before us, Fireman's Fund believed, albeit incorrectly, that it was Nebraska Boiler's insurer during the period in which the court ultimately determined Risor was injured. Fireman's Fund, representing Nebraska Boiler, vigorously defended against Risor's claim. Twin City fails to make any argument that there was fraud or collusion against it. Rather, the evidence is that Nebraska Boiler's interests, represented by attorneys provided by Fireman's Fund, were substantially the same as Twin City's. As such, we do not find a violation of Twin City's right to procedural due process from the fact that Twin City was not notified of Risor's action against Nebraska Boiler and was not made a party to the proceedings before the review panel.

Whether indemnification or any other remedy is available to Twin City is not before us in this appeal. But Risor, who was under no obligation to join insurers in his action against Nebraska Boiler, should not now have to wait for the resolution of insurance policy and other disputes regarding coverage to establish his award for workers' compensation.

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[26] *Id.* at 849, 636 P.2d at 981.

[27] *Id.* at 850, 636 P.2d at 982.

[28] See, *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000); *Home Indem. Co. v. King*, *supra* note 21; *Fidelity & Casualty Co. v. Vantaggi*, 309 Mich. 633, 16 N.W.2d 101 (1944); *Bernard v. Aetna Ins. Co.*, *supra* note 21; *Equitable Underwriters v. Industrial Com.*, *supra* note 21.

To the extent that Twin City is complaining of a due process violation because the date of the injury found by the single judge was not a date alleged in Risor's pleadings, that issue is more properly the subject of an appeal on the merits. We are uncertain how that alleged deficiency is relevant to intervention. Moreover, we find that Twin City and Nebraska Boiler's interests in any controversy on this issue are substantially similar. Thus, this complaint likewise fails to call for Twin City's intervention in its own behalf. Twin City would be free to represent the interests of its insured, Nebraska Boiler, in the appeal of the award to the review panel, if it so chooses.

As a practical matter, an insurer is notified of the proceedings against an insured because the insured would have an interest in its insurer's providing representation in the insured's behalf, and because the failure to provide such notice would be a breach of its policy with the insurer. Thus, normally, the insurer's representatives participate in the workers' compensation action, even though the insurer may not be a party. And the date of the injury is usually not a surprise to the parties of the action, including, as alleged in this case, the employee himself. Thus, we recognize that the circumstances surrounding Twin City's request for intervention are unique. Nevertheless, there is no statutory or constitutional authority for allowing Twin City to intervene in a review proceeding. The review panel was correct in denying Twin City's motion to intervene.

## CONCLUSION

For the foregoing reasons, we affirm the judgment below.

AFFIRMED.

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DAVID J. ANDERSON, APPELLEE, V. ROBERT HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

744 N.W.2d 410

Filed February 1, 2008. Nos. S-05-1561, S-06-206.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.

2. **Habeas Corpus: Appeal and Error.** On appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
3. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
4. **Jurisdiction: Venue: Waiver.** Litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent. In contrast, venue provisions confer a personal privilege which may be waived by the defendant.
5. **Habeas Corpus.** An application for habeas relief may be made to any one of the judges of the district court or to any county judge.
6. **Habeas Corpus: Jurisdiction.** An application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined. And where proceedings are instituted in another county, it is the duty of the court, on objection to its jurisdiction, to dismiss the proceedings.
7. ____: ____. Where application is made for a writ of habeas corpus to the district court of a county other than that in which the prisoner is confined and the officer in whose custody the prisoner is held brings the latter into court and submits to the jurisdiction without objection, the prisoner is then under confinement in the county where the action is brought, and the court has authority to inquire into the legality of his or her restraint.
8. **Habeas Corpus.** The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a custodial deprivation of liberty.
9. **Habeas Corpus: Proof.** To secure habeas corpus relief, the prisoner must show that he or she is being illegally detained and is entitled to the benefits of the writ.
10. **Sentences: Equity.** Credit for time erroneously at liberty is an equitable doctrine and should be applied only where equity demands its application.
11. ____: ____. No equitable relief is required where a prisoner causes his or her own premature release from prison, thwarts governmental attempts at recapture, or misbehaves while at liberty.
12. ____: ____. Where it is clear that a prisoner had knowledge of a government mistake and made no effort to correct it, equity does not demand credit for time at liberty.
13. ____: ____. Prisoners who had knowledge of a governmental mistake and yet made no effort to correct it—like prisoners who actively cause or prolong a premature release or commit crimes while at liberty—do not deserve sentence credit under the equitable doctrine.
14. **Sentences: Notice.** To preserve the right to credit for time spent at liberty, a prisoner who knows his or her release is erroneous must make a reasonable attempt to notify authorities of the mistake.
15. ____: ____. Although the prisoner need not continue to badger the authorities, a reasonable attempt may well include voicing an objection at the time of release or contacting authorities a short time later in order to clarify his or her status.
16. **Sentences: Proof.** The prisoner carries the burden to show that the complexity in calculating his or her release date, or some cognitive deficiency, prevented him or her from realizing the release was premature. The government has what essentially

amounts to a burden of production to provide the prisoner with any and all records relevant to this inquiry. Such records would include any copies of the original sentencing order, as well as any records related to earned release time, work release, commutations, and any other such materials.

17. **Jurisdiction: Final Orders: Appeal and Error.** A trial court is divested of jurisdiction when a party perfects appeal of a final order.
18. **Habeas Corpus: Final Orders: Proof.** The test of finality for the purpose of an appeal in a habeas corpus proceeding is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment.
19. **Habeas Corpus: Final Orders.** An order denying habeas corpus relief qualifies as a final order.
20. ____: ____. An order granting habeas corpus relief qualifies as a final order.

Appeals from the District Court for Douglas County: MARLON A. POLK, Judge. Judgment in No. S-05-1561 reversed, and cause remanded for further proceedings. Judgment in No. S-06-206 vacated.

Jon Bruning, Attorney General, Kimberley Taylor-Riley, and Ryan Gilbride for appellant.

Michael D. Nelson and Cathy R. Saathoff, of Nelson Law, L.L.C., and April L. O'Loughlin, of O'Loughlin Law, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

## I. INTRODUCTION

David J. Anderson, an inmate at the Nebraska State Penitentiary in Lancaster County, filed a writ of habeas corpus in the district court for Douglas County. In his writ, Anderson requested sentence credit for time he spent at liberty after the Nebraska Department of Correctional Services (Department) mistakenly released Anderson long before his sentences were to expire. After concluding that it had jurisdiction over the matter, the district court granted Anderson's writ. The Department appealed and also filed a petition to bypass the Nebraska Court of Appeals, which we granted. We reverse, and remand for reasons set forth below. We also vacate the district court's orders for related legal fees and costs.

## II. BACKGROUND

Anderson was convicted in Douglas County District Court of a Class III felony, theft by unlawful taking, and a Class IV felony, theft by unlawful taking. The court sentenced Anderson to 3 to 5 years' imprisonment for the Class III felony and 20 months' to 5 years' imprisonment for the Class IV felony. The court ordered the sentences to run concurrently.

On July 8, 2003, the Department mistakenly released Anderson from incarceration a mere 3 months into his sentence. If Anderson had remained in custody, he would have been eligible for parole on July 14, 2004, with a mandatory release date of July 14, 2005. The Department eventually discovered its mistake and, on September 16, 2003, filed a motion for capias and notice of hearing in the Douglas County District Court. The record is unclear, however, whether notice of this hearing was sent to Anderson, nor is it clear whether he received it. Anderson claims he did not receive the notice. Either way, Anderson did not appear at the hearing scheduled for September 24. That same day, the district court issued an order directing any law enforcement officers to arrest Anderson if they located him. Although the record does not explain why, the clerk's office did not issue that warrant for approximately 14 months.

In the interim, however, Douglas County filed a motion for declaration of forfeiture of Anderson's bail bond for the reason that Anderson failed to appear at the September 24, 2003, hearing. This motion, which was filed on March 17, 2004, and an accompanying letter were mailed to Anderson at an address specified in the certificate of service. Had Anderson received these documents, he certainly would have had reason to believe that something was amiss with his status as a released prisoner. It is not clear, however, where the county obtained that address or whether the address was, in fact, accurate. On March 26, the court entered a default judgment forfeiting Anderson's bond.

On January 3, 2005, a little more than 9 months after the bond forfeiture proceeding, police arrested Anderson during a routine traffic stop. Anderson was then returned to the Nebraska State Penitentiary in Lancaster County. After accounting for the time Anderson was absent from prison, the Department found that his

recalculated parole eligibility date was January 9, 2006, and that his new mandatory release date was January 9, 2007.

Anderson then filed a writ of habeas corpus in Douglas County District Court. At the initial hearing, the Department waived any objection to jurisdiction in Douglas County. Anderson was then transported from the state penitentiary to the Douglas County Correctional Center by the Douglas County sheriff. Sometime later, however, the Department attempted to quash Anderson's habeas corpus petition on the ground that the Douglas County District Court lacked subject matter jurisdiction. After an evidentiary hearing, the district court concluded that it had jurisdiction. This conclusion was based on *Gillard v. Clark*,[1] which the district court read as standing for the proposition that jurisdiction in habeas proceedings can effectively be transferred from one county to another. The district court noted that the Department waived jurisdiction at the initial hearing and therefore concluded that jurisdiction was proper in Douglas County.

The court then held an evidentiary hearing to address the merits of Anderson's underlying habeas claim. Here, the court cited our decision in *State v. Texel*,[2] in which we held that prisoners must serve their sentences continuously and therefore may not consent to serving sentences intermittently. As a result, the court granted Anderson's writ. In response, the Department filed a notice of appeal, our case No. S-05-1561.

Shortly thereafter, the district court entered two additional orders. In its first order, filed on January 20, 2006, the court granted Anderson's request that the Department pay court costs. Then, in an order filed on February 10, 2006, the court permitted Anderson to withdraw his request that the Department pay his legal fees. The Department appealed these orders, our case No. S-06-206, and filed a petition to bypass the Court of Appeals. We consolidated both appeals for our review.

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[1] *Gillard v. Clark*, 105 Neb. 84, 179 N.W. 396 (1920).

[2] *State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989).

## III. ASSIGNMENTS OF ERROR

On appeal, the Department assigns that the district court erred by (1) finding that it had subject matter jurisdiction over Anderson's habeas petition, (2) granting habeas corpus relief to Anderson, and (3) entering the January 20 and February 10, 2006, orders after the Department perfected its initial appeal.

## IV. STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[3]

[2] It appears that Nebraska case law has not yet expressly identified the exact standard of review on appeal of a habeas petition. Drawing insight from other jurisdictions, we hold that on appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.[4]

## V. ANALYSIS

We think it prudent to address the arguments in the order in which they were presented to us. Accordingly, we begin our analysis by addressing whether the district court had jurisdiction and then consider the Department's claim that Anderson was not entitled to habeas relief. We conclude our analysis by addressing the orders of the district court issued after the Department's notice of appeal.

### 1. Jurisdictional Question

[3] The Department claims that the district court for Douglas County did not have subject matter jurisdiction over Anderson's habeas petition because Anderson was confined in Lancaster County. It is well established that if the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.[5] Thus, if the district court lacked jurisdiction to

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[3] *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

[4] See *Garcia v. Mathes*, 474 F.3d 1014 (8th Cir. 2007).

[5] *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

entertain Anderson's habeas petition, we, too, would have no jurisdiction to review the merits of Anderson's petition.

[4] Before we proceed to the substance of the jurisdictional issue, we pause to note our belief that the Department may have misspoken when it fashioned its argument. The argument that the case should have been brought in the district court for Lancaster County as opposed to the district court for Douglas County is perhaps a challenge to venue rather than subject matter jurisdiction. The difference is significant. For one, litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent.[6] In contrast, venue provisions confer a personal privilege which may be waived by the defendant.[7]

[5] In addition, we think it clear that the Douglas County District Court had subject matter jurisdiction in this case. Under Nebraska law, an application for habeas relief may be made to "*any* one of the judges of the district court, or to any county judge."[8] Because "any" district judge obviously includes the district court for Douglas County, it is beyond dispute that the district court for Douglas County had subject matter jurisdiction over Anderson's habeas claim.

[6] But while the above language makes clear that any and all district courts in Nebraska have subject matter jurisdiction over habeas claims, it does not identify *which county's* district courts may hear habeas claims. This issue—essentially a question of venue—is the issue which lies at the heart of the Department's argument. To resolve that question, we turn to *Gillard*,[9] in which this court held that

> an application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined. [Citation omitted.] And where proceedings are instituted in another

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[6] *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000) (citing *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999)).

[7] *Id.*

[8] Neb. Rev. Stat. § 29-2801 (Reissue 1995) (emphasis supplied).

[9] *Gillard, supra* note 1, 105 Neb. at 87, 179 N.W. at 398. See, also, *Addison v. Parratt*, 204 Neb. 656, 284 N.W.2d 574 (1979).

> county, it is the duty of the court, on objection to its jurisdiction, to dismiss the proceedings.

Relying on *Gillard*, the Department points out that Anderson was confined in the Nebraska State Penitentiary in Lancaster County, yet sought habeas relief in the district court for Douglas County. In effect, the Department appears to suggest that the district court for Douglas County was not the proper venue to litigate the merits of Anderson's habeas claim.

[7] While the Department would be correct under *Gillard*'s general rule, other language in *Gillard* provided for a narrow exception:

> [W]here application is made for a writ of habeas corpus to the d[i]strict court of a county other than that in which the prisoner is confined, and the officer in whose custody the prisoner is held brings the latter into court and submits to the jurisdiction without objection, the prisoner is then under confinement in the county where the action is brought, and the court has authority to inquire into the legality of his restraint.[10]

We believe this exception applies here. Although Anderson filed his habeas petition in Douglas County—a county other than the one in which he was confined—Anderson was later transferred to the Douglas County Correctional Center. Moreover, the Department submitted to the court's "jurisdiction" at the initial hearing by failing to object to venue in Douglas County. As such, Anderson was under confinement in Douglas County. The Douglas County District Court therefore had authority to consider the legality of Anderson's restraint.

### 2. Anderson's Claim for Habeas Relief

[8,9] Having resolved that the district court had jurisdiction over Anderson's habeas claim, we turn now to address the merits of the habeas claim itself. The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a custodial deprivation of liberty.[11] To secure habeas corpus relief, the prisoner must show that he

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[10] *Gillard, supra* note 1, 105 Neb. at 87, 179 N.W. at 398.

[11] See *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

or she is being illegally detained and is entitled to the benefits of the writ.[12]

Anderson argues that he is entitled to day-for-day credit toward his sentence for the time that he, an erroneously released prisoner, spent at liberty. Anderson essentially believes that his sentence continued to run from July 8, 2003, the date of erroneous release, to January 3, 2005, the date he was picked up by officers, as though he were in prison the entire time. Therefore, Anderson believes the Department was obligated to release him no later than July 14, 2005, the date his sentence was originally set to expire, and that detaining him beyond that date was illegal.[13]

In making this argument, Anderson invokes a line of cases under which erroneously released prisoners received sentence credit based on the belief that prematurely releasing and then reincarcerating a prisoner impermissibly interferes with the prisoner's right to expeditiously pay his or her debt to society.[14] We review this authority immediately below, then address what impact it may have on the present case in a subsequent section.

(a) Theories Permitting Relief to Prematurely Released Prisoners

As set forth in the seminal case of *White v. Pearlman*,[15] a prisoner's "chance to re-establish himself and live down his past" is frustrated if the prisoner is prevented from serving his sentence continuously. This is because "a prisoner sentenced to five years might be released in a year; picked up a year later to serve three months, and so on ad libitum, with the result that he is left without even a hope of beating his way back."[16] Therefore, on the theory that the government should not be "permitted to

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[12] See *id.*

[13] See *Piercy v. Parratt*, 202 Neb. 102, 273 N.W.2d 689 (1979).

[14] See, *In re Roach*, 150 Wash. 2d 29, 74 P.3d 134 (2003) (collecting cases); Gabriel J. Chin, *Getting out of Jail Free: Sentence Credit for Periods of Mistaken Liberty*, 45 Cath. U. L. Rev. 403 (1996) (same).

[15] *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930).

[16] *Id.*

play cat and mouse with the prisoner, delaying indefinitely the expiation of his debt to society and his reintegration into the free community,"[17] numerous courts now employ various remedies in cases involving interrupted sentences.

Specifically, courts have developed three distinct theories for granting relief to a prematurely released prisoner.[18] The first theory is based on notions of due process and is often called the "waiver-of-jurisdiction theory."[19] It appears that courts apply the waiver-of-jurisdiction theory when the premature release resulted from gross negligence by prison officials and lasted "a long period of time."[20] In such cases, the government is said to have waived its right to reincarcerate the prisoner and thus the remedy is a complete exoneration of the prisoner's sentence.[21] The rationale is that it would be "unequivocally inconsistent with 'fundamental principles of liberty and justice' to require a legal sentence to be served" after such an interruption.[22]

The second theory, devised by the Ninth Circuit, is known as the "estoppel theory" and is also rooted in notions of due process.[23] Under this theory, the government is estopped from reincarcerating the prisoner when a particular set of circumstances are present. Essentially, those circumstances arise when (1) the government knew the facts surrounding the release, (2) the government intended that the prisoner would rely upon its actions or acted in such a manner that the prisoner had a right to rely on them, (3) the prisoner was ignorant of the facts, and (4) the prisoner relied on the government's actions to his or her detriment.[24]

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[17] *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994).

[18] See, *Tyler, supra* note 11; *In re Roach, supra* note 14.

[19] *Schwichtenberg v. ADOC*, 190 Ariz. 574, 577, 951 P.2d 449, 452 (1997).

[20] *In re Roach, supra* note 14, 150 Wash. 2d at 34, 74 P.3d at 137. See, also, *Schwichtenberg, supra* note 19.

[21] *In re Roach, supra* note 14; *Schwichtenberg, supra* note 19.

[22] *Green v. Christiansen*, 732 F.2d 1397, 1399 (9th Cir. 1984).

[23] *U.S. v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988). Accord *Schwichtenberg, supra* note 19 (citing *Martinez, supra*).

[24] *Green, supra* note 22.

Notably, a prisoner who knew that his or her release was erroneous cannot claim to have been "ignorant of the facts" and therefore cannot invoke the estoppel theory.[25] Further, because the estoppel theory is rooted in due process, and because a due process challenge to executive action requires behavior that is "egregious [and] outrageous,"[26] the estoppel theory requires some affirmative misconduct by authorities.[27]

The third and final remedy courts use in interrupted-detention cases is to grant a prisoner day-for-day credit for the time spent at liberty.[28] However, numerous federal appellate courts have held that the Due Process Clause does not require credit for the time spent at liberty in cases of an interrupted sentence.[29] Instead, credit for time spent at liberty is a common-law doctrine rooted in equity and is often called the "equitable doctrine."[30] In contrast to the waiver-of-jurisdiction or estoppel theories, a prisoner is eligible for credit under the equitable doctrine when the premature release is due to simple negligence by officials.[31]

By asking for day-for-day credit toward his sentence, Anderson relies solely on the equitable doctrine of credit for time spent at liberty. He does not advance an argument under the waiver-of-jurisdiction or estoppel theories, nor do we find evidence in the record suggesting that the Department committed misconduct rising to the level of a due process violation when it prematurely released Anderson. As such, today's decision focuses solely on whether Anderson is entitled to credit for time spent at liberty under the equitable doctrine.

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[25] *Martinez, supra* note 23, 837 F.2d at 865.

[26] *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

[27] *Martinez, supra* note 23.

[28] *Tyler, supra* note 11; *In re Roach, supra* note 14.

[29] See, e.g., *Vega v. U.S.*, 493 F.3d 310 (3d Cir. 2007); *Thompson v. Cockrell*, 263 F.3d 423 (5th Cir. 2001); *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999); *Dunne, supra* note 17.

[30] *Tyler, supra* note 11, 273 Neb. at 108, 728 N.W.2d at 556. Accord, *In re Roach, supra* note 14; *Schwichtenberg, supra* note 19.

[31] *In re Roach, supra* note 14; *Schwichtenberg, supra* note 19.

For decades, the common-law rule in Nebraska was harsh but simple: Prisoners were not entitled to credit for time spent outside the prison, regardless of the circumstances.[32] The first sign that this longstanding rule might be in jeopardy came in *Texel*.[33] In dicta, the *Texel* court observed that prisoners have the right to serve their sentences in a continuous manner,[34] a conclusion which, as noted above, is universally cited as a reason to provide a remedy in interrupted-sentence cases.[35]

More recently, we had occasion to discuss credit for time spent at liberty in *Tyler v. Houston*.[36] In *Tyler*, a prisoner sought day-for-day credit for time spent out on bond while the state appealed, and ultimately succeeded in overturning, the district court's grant of habeas relief. Although we surveyed court decisions applying the equitable doctrine, we found it unnecessary to formally adopt or reject the doctrine in that case. As we explained, even jurisdictions recognizing the equitable doctrine refused to grant credit for time spent at liberty while the government appeals an adverse habeas ruling.[37]

Resolving Anderson's claim requires that we finally confront questions hinted at in *Texel* and left unresolved in *Tyler*: Are prisoners in Nebraska ever entitled to day-for-day credit for time erroneously spent at liberty under the equitable doctrine, and if so, under what circumstances will such credit be forthcoming? It is to those questions that we now turn.

(b) Variations of the Equitable Doctrine

In considering whether to adopt the equitable doctrine in Nebraska, we note that there are numerous variations to choose from. The Ninth Circuit, for example, simply grants credit for time erroneously spent at liberty so long as the prisoner did

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[32] See, *Ulrich v. O'Grady*, 136 Neb. 684, 287 N.W. 81 (1939); *Goodman v. O'Grady*, 135 Neb. 612, 283 N.W. 213 (1939); *Mercer v. Fenton*, 120 Neb. 191, 231 N.W. 807 (1930).

[33] *Texel, supra* note 2.

[34] *Id.*

[35] See, e.g., *White, supra* note 15.

[36] *Tyler, supra* note 11.

[37] *Id.* (citing *Hunter v. McDonald*, 159 F.2d 861 (10th Cir. 1947)).

not contribute to his or her release.[38] In so holding, the Ninth Circuit does not take into account whether the prisoner misbehaves while at liberty.[39] Several other courts, however, find that prisoners who "abscond[] legal obligations while at liberty" are not entitled to credit for time spent at liberty under the equitable doctrine.[40]

Similarly, courts recognizing the equitable doctrine disagree about whether to grant credit to prisoners who remained silent when released, even though they knew the release was premature. A few courts, including the Ninth Circuit and Arizona Supreme Court, conclude that such "informed silence" is inconsequential. Those courts grant credit for time spent at liberty even where the prisoner knew the release was erroneous and yet said nothing to authorities.[41] In contrast, several other courts have either denied credit in cases of informed silence[42] or, conversely, granted credit specifically because the prisoner informed officials of the mistake.[43]

The district court in this case specifically found that Anderson did not cause his premature release, nor is there evidence that Anderson committed any crimes while he was erroneously at liberty. However, a legitimate question remains as to whether Anderson knew that his release was premature and yet remained silent.

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[38] *Martinez, supra* note 23.

[39] See *Schwichtenberg, supra* note 19 (citing *Martinez, supra* note 23).

[40] *Tyler, supra* note 11, 273 Neb. at 109, 728 N.W.2d at 557. See, e.g., *In re Roach, supra* note 14; *Brown v. Brittain*, 773 P.2d 570 (Colo. 1989); *In re Messerschmidt*, 104 Cal. App. 3d 514, 163 Cal. Rptr. 580 (1980).

[41] See, *Martinez, supra* note 23; *Schwichtenberg, supra* note 19. See, also, *Vega, supra* note 29; *People ex rel. Bilotti v. Warden*, 42 A.D.2d 115, 345 N.Y.S.2d 584 (1973).

[42] *Diaz v. Holder*, 136 Fed. Appx. 230 (11th Cir. 2005); *Gaines v. Florida Parole Com'n*, 962 So. 2d 1040 (Fla. App. 2007); *Pugh v. State*, 563 So. 2d 601 (Miss. 1990). See, also, *In re Roach, supra* note 14 (Chambers, J., concurring).

[43] *White, supra* note 15; *United States v. Merritt*, 478 F. Supp. 804 (D.D.C. 1979); *Hartley v. State*, 50 Ala. App. 414, 279 So. 2d 585 (1973) (quoting *White, supra* note 15).

In *Schwichtenberg v. ADOC*,[44] the Arizona Supreme Court addressed whether prisoners who remain in informed silence are entitled to credit under the equitable doctrine. The court framed the issue as whether a prisoner was "at fault" for his premature release simply because he knew the release was erroneous yet said nothing. The court observed that "fault" implies that an individual "refrained from doing that which he had a duty to do."[45] Because a prisoner is "under no legal obligation" to speak up, the court concluded that a prisoner's informed silence should not disqualify him or her for sentence credit under the equitable doctrine.[46]

[10] We believe, however, that credit for time spent at liberty should be unavailable to prisoners who are aware of the error, yet fail to object. A refusal to grant credit for time spent at liberty is not a form of punishment, and therefore, it is irrelevant that prisoners have no legal duty to bring a mistake to the attention of authorities. Rather, "[c]redit for time erroneously at liberty is an equitable doctrine and should be applied only where equity demands its application."[47] Therefore, the conclusion that informed silence disqualifies a prisoner from receiving sentence credit reflects not so much that the prisoner failed to execute a legal duty, but that such behavior renders the prisoner ineligible for equitable relief.

That certain behavior might prevent a prisoner from invoking the equitable doctrine is not a novel concept. Indeed, as noted above, numerous courts believe that it would offend notions of equity to credit a prisoner for time erroneously spent at liberty if the individual spent that time committing additional crimes. We believe similar considerations ought to apply as to how a prisoner handles the prospect of being released prematurely.

It has been said, both here and elsewhere, that two rights are served by the equitable doctrine. The first right is society's "right to expect that once a defendant has been incarcerated, the

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[44] *Schwichtenberg, supra* note 19.

[45] *Id.* at 579, 951 P.2d at 454.

[46] *Id.*

[47] *In re Roach, supra* note 14, 150 Wash. 2d at 38, 74 P.3d at 139 (Chambers, J., concurring).

time will not be served in bits and pieces."[48] Of course, it is also true that "[t]hose tried and convicted of crimes owe a debt to society" and that "[s]ociety is entitled to have that debt paid."[49] So whatever society's interest in seeing that the government does not play cat and mouse with prisoners, society has at least as much "interest in knowing that its criminals are serving the punishment to which they have been sentenced, regardless of . . . negligent error attributable to the government."[50]

That leaves us with the other interest served by the equitable doctrine: The right of "a prisoner . . . to pay his debt to society in one stretch, not in bits and pieces."[51] Drawing upon this language, Anderson reminds us that he "had the right to serve his sentence in one single period of incarceration under Nebraska law."[52] Of course, a prisoner who genuinely cherishes his right to a continuous sentence, as Anderson purports to be, should at least "call[] attention to the mistake being made" before being "ejected from the penitentiary."[53]

In contrast, a prisoner who remains in informed silence when erroneously released and then asks for equitable relief upon reincarceration is not truly motivated by the right to a continuous sentence. Rather, such a prisoner is motivated by nothing more than the unsurprising desire to avoid as much jail time as possible. It takes little imagination to see that prisoners who know their release is premature might nevertheless remain silent in the hope that the mistake will go unnoticed by officials. Predictably, when officials discover the mistake, these prisoners try to obtain credit for time spent at large by arguing that the mistaken release—a mistake they declined to point out—deprived them of the right to a continuous sentence. It seems plain to us, however, that the equitable doctrine

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[48] *Texel, supra* note 2, 230 Neb. at 814, 433 N.W.2d at 544.

[49] *In re Roach, supra* note 14, 150 Wash. 2d at 38, 74 P.3d at 139 (Chambers, J. concurring).

[50] *Com. v. Blair*, 699 A.2d 738, 743 (Pa. Super. 1997). See, also, *Artez v. Mulcrone*, 673 F.2d 1169 (10th Cir. 1982).

[51] *Texel, supra* note 2, 230 Neb. at 814, 433 N.W.2d at 544.

[52] Brief for appellee at 9.

[53] See *White, supra* note 15, 42 F.2d at 789.

was not meant to encourage such a blatant attempt to game the system.

[11-13] Like a majority of courts, we agree that no equitable relief is required where a prisoner causes his or her own premature release from prison, thwarts governmental attempts at recapture, or misbehaves while at liberty. But we also believe that "[w]here it is clear that a prisoner had knowledge of a government mistake and made no effort to correct it, equity does not demand credit for time at liberty."[54] As such, we hold that prisoners who had knowledge of a governmental mistake and yet made no effort to correct it—like prisoners who actively cause or prolong a premature release or commit crimes while at liberty—do not deserve sentence credit under the equitable doctrine. Such a prisoner has essentially acquiesced in the loss of his or her right to a continuous sentence.

[14,15] To preserve the right to credit for time spent at liberty, a prisoner who knows his or her release is erroneous must make a reasonable attempt to notify authorities of the mistake. Although the prisoner need not "continue to badger the authorities," a reasonable attempt may well include voicing an objection at the time of release or contacting authorities a short time later in order to clarify his or her status.[55]

Having determined that informed silence disqualifies a prisoner from receiving credit for time spent at liberty, we next address how lower courts should determine whether the prisoner knew that the release was, in fact, premature. It has been argued elsewhere that determining whether a prisoner knew the release was premature would be "difficult or impossible."[56] The argument is that the complex nature of modern sentencing schemes would make it difficult for prisoners to identify a precise release date and therefore recognize that they are being released prematurely.[57]

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[54] See *In re Roach, supra* note 14, 150 Wash. 2d at 39-40, 74 P.3d at 139 (Chambers, J., concurring).

[55] *Merritt, supra* note 43, 478 F. Supp. at 807.

[56] *Schwichtenberg, supra* note 19, 190 Ariz. at 579, 951 P.2d at 454.

[57] See *id.* See, also, *In re Roach, supra* note 14 (Chambers, J., concurring).

[16] In responding to these concerns, we note that "[a]mong our most cherished rights, as American citizens, are the freedom of choice as to our movements, to be free to go where and when we wish, and the right to control and use our worldly possessions as we see fit."[58] Given the significance of those interests, we believe that unless the sentence has been extensively modified by things such as earned release time, work release, or a commutation, a prisoner ought to know the date of his or her release with some precision. We therefore hold that the prisoner carries the burden to show that the complexity in calculating his or her release date, or some cognitive deficiency, prevented him or her from realizing the release was premature. At the same time, the government has what essentially amounts to a burden of production to provide the prisoner with any and all records relevant to this inquiry. Such records would include any copies of the original sentencing order, as well as any records related to earned release time, work release, commutations, and any other such materials.

The record in this case does not conclusively resolve whether Anderson tried to inform officials that his release was premature. We therefore find it necessary to remand this cause for the trial court to determine whether Anderson tried to inform officials of their mistake and, if not, whether Anderson reasonably did not know his sentence was set to expire.

On remand, the district court is directed to make findings regarding the circumstances surrounding the 14-month lag from the date the district court authorized Anderson's recapture and the date the warrant was actually issued. Specifically, the district court is to determine whether Anderson had or should have had notice of the September 24, 2003, hearing on the Department's motion for capias. The parties should also present evidence with regard to Douglas County's motion to declare a forfeiture of Anderson's bond. If notice of either hearing was mailed to Anderson's residence, it could be evidence that Anderson knew his release was premature from that point forward. We reemphasize that the Department has a duty to provide any records and documents that may be relevant to this inquiry.

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[58] *Boockholdt v. Brown*, 224 Ga. 737, 739, 164 S.E.2d 836, 838 (1968).

On remand, the parties should also present evidence as to why the arrest warrant for Anderson was not issued immediately after it was authorized by the district judge on September 24, 2003. Since the Department has a responsibility to provide any records relevant to this issue, the district court's inquiry in this regard should include a determination as to whether the delay was the part of an organized and diligent plan to notify, find, and reapprehend Anderson, or was instead the product of misconduct—negligent or affirmative—by public officials. If the latter, the district court shall determine what impact, if any, this should have on the equities of denying Anderson credit for any or all of the 14 months after the warrant was authorized, but before it was issued. Obviously, this equitable analysis should be conducted in a manner consistent with the rationale and policies expressed in this opinion.

### 3. Propriety of Orders Following Department's Notice of Appeal

The only issue remaining for our resolution is whether the district court exceeded its authority when it issued orders granting Anderson's request for payment of court costs and granting Anderson's motion to withdraw a prior request for legal fees. To refresh, these orders, filed on January 20 and February 10, 2006, respectively, were issued *after* the Department had already filed notice of its intent to appeal the district court's decision to grant Anderson habeas relief.

[17] It is well settled that a trial court is divested of jurisdiction when a party perfects appeal of a final order.[59] The question here is whether an order granting habeas relief to the petitioner qualifies as a final order. Anderson argues that the order granting the writ of habeas corpus was not a final order because there were still matters left for the court to resolve. The Department argues the district court's order granting Anderson habeas relief was the final, appealable order. We agree.

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[59] See, *Billups v. Scott*, 253 Neb. 293, 571 N.W.2d 607 (1997); *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997); *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

[18-20] Long ago, this court held that "[t]he test of finality for the purpose of an appeal in a habeas corpus proceeding is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment."[60] We have previously held that an order denying habeas corpus relief qualifies as a final order.[61] Therefore we hold that an order granting habeas relief also qualifies as a final order. As such, the district court was divested of jurisdiction when the Department perfected its appeal of the district court's order granting Anderson's petition for habeas relief. We therefore vacate the orders filed January 20 and February 10, 2006, for lack of jurisdiction.

## VI. CONCLUSION

We conclude that the Douglas County District Court had jurisdiction over Anderson's habeas petition. Anderson was confined in Douglas County at the time of the initial hearing in this case, and the Department waived jurisdiction at the initial hearing.

We further conclude that the district court erred in granting Anderson's habeas claim. The equitable doctrine of sentence credit for time spent at liberty should not apply in cases where the prisoner (1) caused or prolonged the premature release, (2) committed crimes while at liberty, or (3) knew the release was premature yet failed to bring the mistake to the government's attention. Because we cannot determine, based on this record, whether Anderson attempted to inform authorities of their mistake, we find it necessary to remand the cause to the district court. On remand, the court is to determine whether Anderson made a reasonable attempt to inform authorities of their mistake and, if not, whether Anderson legitimately did not know his release was premature. As expressed above, the court is also directed to make factual findings and conclusions regarding the circumstances surrounding the 14-month period between the

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[60] *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 825, 14 N.W.2d 840, 843 (1944).

[61] *Olson, supra* note 60.

time the district court authorized an arrest warrant for Anderson and when it was issued.

Finally, we hold that the district court lacked jurisdiction when it issued two orders after the Department perfected its appeal of the court's decision to grant Anderson's petition. Accordingly, those orders are hereby vacated.

JUDGMENT IN NO. S-05-1561 REVERSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.
JUDGMENT IN NO. S-06-206 VACATED.

CONNOLLY and GERRARD, JJ., concur in the result.

WRIGHT, J., concurring.

I concur. The issue is whether Anderson is entitled to credit for time spent at liberty as a result of being prematurely released. This is an equitable doctrine.

If the prisoner is obligated to notify the proper authority when he knows his release was premature, the State has an obligation to act when it discovers the error. The State is permitted one error, but not two.

The Department discovered its mistake and sought a warrant in Douglas County District Court. The court signed the warrant, but the clerk's office did not issue the warrant for approximately 14 months.

When considering what is fair, the State cannot be twice negligent at the prisoner's expense. Once the State discovered the premature release, it had a duty to act promptly.

If the State cannot establish a valid reason why the warrant was not issued immediately after it was signed by the court, Anderson should be entitled to credit for the time the State knowingly failed to act. There is no evidence that Anderson caused his premature release, nor is there evidence that he committed any crimes while he was at liberty. Equity must shine on both sides of the coin.

# IN RE DISSOLUTION AND WINDING UP OF KEYTRONICS, FORMERLY KNOWN AS SECURE DATA SYSTEMS, A NEBRASKA GENERAL PARTNERSHIP. SCOTT WILLSON, APPELLANT, V. DON KING, APPELLEE.

744 N.W.2d 425

Filed February 1, 2008. No. S-06-690.

1. **Partnerships: Appeal and Error.** In considering the proper standard of review for the question of the existence of a partnership, an appellate court applies the standard of review generally applicable to the underlying action.
2. **Partnerships: Equity: Appeal and Error.** An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in the appellate court de novo on the record.
3. **Partnerships: Intent.** A business qualifies under the "business for profit" element of Neb. Rev. Stat. § 67-410(1) (Reissue 2003) so long as the parties intended to carry on a business with the expectation of profits.
4. **Partnerships: Proof.** The burden of establishing the partnership is upon the party asserting that such a relationship exists.
5. ____: ____. In an action inter sese between alleged partners, the party asserting the existence of a partnership must prove that relationship by a preponderance of the evidence.
6. **Partnerships: Intent.** If the parties' voluntary actions form a relationship in which they carry on as co-owners of a business for profit, then they may inadvertently create a partnership despite their expressed subjective intention not to do so.
7. ____: ____. Being "co-owners" of a business for profit does not refer to the co-ownership of property, but to the co-ownership of the business intended to garner profits.
8. **Partnerships: Words and Phrases.** Co-ownership distinguishes partnerships from other commercial relationships such as creditor and debtor, employer and employee, franchisor and franchisee, and landlord and tenant.
9. **Partnerships.** Co-ownership generally addresses whether the parties share the benefits, risks, and management of the enterprise such that (1) they subjectively view themselves as members of the business rather than as outsiders contracting with it and (2) they are in a better position than others dealing with the firm to monitor and obtain information about the business.
10. **Partnerships: Proof.** The objective indicia of co-ownership are commonly considered to be: (1) profit sharing, (2) control sharing, (3) loss sharing, (4) contribution, and (5) co-ownership of property. The five indicia of co-ownership are only that; they are not all necessary to establish a partnership relationship, and no single indicium of co-ownership is either necessary or sufficient to prove co-ownership.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded for further proceedings.

Mitchel L. Greenwall, of Yeagley, Swanson & Murray, L.L.C., for appellant.

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

The issue in this case is whether a business partnership was formed between Don King and Scott Willson and, if so, what business activities were part of that partnership. The Uniform Partnership Act of 1998 (the Act),[1] at § 67-410(1), states that "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." Willson brought an action for the winding up and an accounting, alleging formation of a partnership, and King counterclaimed for wrongfully withholding property, denying the partnership. The district court found that King and Willson had "pooled resources, money and labor," but found no partnership existed because there was no "specific agreement." Alternatively, the court found that because King did not commit his preexisting business to any specifically formed partnership, the scope of the partnership did not encompass any activity-garnering profits. Willson appealed the district court's order. We reverse, and remand for further proceedings.

## BACKGROUND

King and Willson first met sometime in 1999 when Willson, an electronics technician and computer programmer, was working at a computer store. King was doing business at that time under the name of "Washco," as a sole proprietorship, and King contracted with the store for a computer repair. Washco sold and installed carwash systems and accessories. It also serviced

[1] Neb. Rev. Stat. §§ 67-401 to 67-467 (Reissue 2003).

existing carwash systems and the systems it sold. Washco later became Wash Systems, Incorporated.

One of the products King offered to his customers was the "QuikPay" system. QuikPay is a cashless vending system for carwashes. Customers use a memory chip key that can be placed on their key chain and used with a controller at the carwash. Either a cash value can be placed on the key, or an account can be established through which carwash usage recorded on the key is billed monthly.

Washco purchased QuikPay systems for resale from Datakey Electronics Inc. (Datakey). Datakey's main line of business was the manufacture and sale of keys with reprogrammable memory and their corresponding "Keyceptacles" for a variety of applications. The QuikPay carwash system was only one such application, and it was becoming unprofitable for Datakey.

Part of the reason that the QuikPay system was unprofitable was that the keys for QuikPay could only be obtained from an attendant. If the key was set up for cash, when the credit ran out, the key could only be recharged through an attendant. Glen Jennings, president of Datakey, explained that since most carwashes are unattended, this reliance on the presence of the carwash owner or employee was limiting the product's market. The system needed some "peripherals" to make it self-service. Datakey had decided, however, not to dedicate its limited engineering resources to the design or manufacture of such "peripherals." It was looking into the possibility of working with an outside source as the original equipment manufacturer of such items.

As QuikPay's largest distributor, King was aware that QuikPay's limitations made the product unattractive to many of his customers. King was also having other problems with the system. In the spring of 2002, Willson was working at a new company as a computer programmer. King contacted Willson privately to see if Willson could develop a combined "key dispenser" and "revalue station" for the QuikPay system that would make the system self-service. King also asked Willson if he would design and install an interface between the QuikPay system and the carwash of one of King's customers. King explained that although most carwashes already contained a

third-party interface that would easily connect with the QuikPay system, a few did not. Without such an interface, King was unable to sell QuikPay to these customers. Designing such an interface was beyond King's technical expertise.

There is little evidence in the record as to what sort of business arrangement was made with regard to Willson's services in designing the interface. King states only that compensation "was never discussed," and, in fact, Willson was never paid for his work. It is undisputed that Willson individually designed and installed at least four specific customer interfaces that allowed King to sell the QuikPay system to those customers.

As to the development of the key dispenser-revalue station, King testified there was an oral agreement among himself, Willson, and Scott Gardeen. Gardeen was an employee of Datakey who was an original designer of QuikPay and was King's main contact with Datakey. According to King, they agreed they would form a corporation whenever Willson developed the key dispenser-revalue station. Gardeen also recalled discussing their business as a future corporation because they were concerned about personal liability issues inherent to partnerships. Willson, on the other hand, had no memory of specifically discussing the formalities of their business relationship. He was sure that they had agreed they would all "be a part of it" and that they "each had a piece of the pie."

The three parties met in Des Moines, Iowa, in the spring of 2002 to discuss the venture in which they would design and build the key dispenser-revalue station and sell it to Datakey. It was agreed that Willson would write the software and do the firmware, hardware, and any other electrical or software work; Gardeen would contribute his knowledge of the system and his contact with Datakey; and King would contribute financial resources and his experience and contacts as QuikPay's largest distributor.

Together, Willson, King, and Gardeen came up with the name "Secure Data Systems" for their business. They discussed the fact that the entity's initials, "SDS," were also the initials of their first names, Scott, Don, and Scott. By the summer, Willson had built a hand-held revalue station for a meeting with Jennings. Jennings indicated that if a

final, marketable key dispenser-revalue station were developed, Datakey would be interested in a business relationship with Secure Data Systems.

In the meantime, King was becoming increasingly frustrated with maintenance of the QuikPay system for his customers. In September 2002, King sent a letter to Gardeen complaining about various issues with the system. The main complaint was that controllers were not operating properly. Although Datakey provided King with replacement controllers, King had to drive long distances to his customers' sites to manually implement the replacement or make other repairs he had not anticipated. In the letter, King stated:

> I can not [sic] continue to expose my self [sic] to the expense of keeping this stuff running. Besides the expense I don't have the time. I don't see that I have any other choice but to back away from selling additional clients. At least until the current problems are stable or we have a new controller. I don't feel like I can honestly charge or pass expense's [sic] on to my customer when this product continues [to] have problems.

King then proposed:

> Because of [Willson's] future interests, I believe he would be more motivated to address issues with the current controller than a programmer with no interest in the system. [Willson] has mentioned that programming cost can exceed one hundred dollars an hour. If . . . Willson were to work on the current system I believe he should be compensated for his work. I would have to discuss it with . . . Willson, but I don't believe he would demand those kind[s] of fees.

King suggested that Datakey allow Willson access to its proprietary software.

King continued to involve Willson in dealing with other technical issues relating to King's QuikPay customers. Willson explained: "[T]here w[ere] a lot of problems with the QuikPay units. Sometimes they would put the wrong version of firmware on there or they wouldn't program for them at all and the units just wouldn't function properly." It became King's regular practice to copy Willson into his e-mail correspondence with

Datakey concerning QuikPay system maintenance. According to Willson, King and Willson communicated regularly about both the development of the key dispenser-revalue station and QuikPay maintenance. Willson testified that he did not demand or receive payment for these services, but believed they were part of his contribution to the partnership.

Around October 2002, Datakey decided to discontinue its QuikPay line. Its minimal sales of QuikPay were outweighed by Datakey's costs in addressing support issues for the product. To each of its customers, Datakey sent one controller for every two they had ever purchased, and informed them that Datakey would no longer be supporting their product.

Datakey referred all of its customers to King at Washco for continued support of the system. Datakey's customer base consisted of approximately 20 or 30 customers with a total of at least 200 QuikPay controllers in use. It is unclear how many QuikPay customers King had had prior to this time. Datakey also gave to King, without charge, all of the parts and equipment relating to QuikPay that Datakey had in stock. This inventory had an original procurement cost of approximately $200,000. Datakey had already given King and Willson access to its software source codes. Jennings explained, "[W]e were happy to have somebody who would give [QuikPay customers] best-efforts supports [sic], because obsoleting a product can reflect poorly on our name." In addition, Datakey hoped to be able to continue selling its keys and Keyceptacles to QuikPay customers, if those systems were kept "alive" by King.

Willson testified that from the moment King acquired Datakey's customers and inventory, Willson was very involved in making this acquisition a success. Willson testified that King immediately asked him to put together a list of things that they needed from Datakey to make all the inventory work. The record contains an e-mail from Willson to King with this list. In the e-mail, Willson also offered to accompany King to Minneapolis, Minnesota, to Datakey's headquarters if necessary and Willson stressed that they would need as much information as possible from Datakey "in order to make this a successful venture."

Willson explained that he was in charge of assembly and repairs of the QuikPay inventory once they received it. The inventory was shipped in pieces, and many of the old input/output, or I/O, boards had to be updated with the newest version of the QuikPay program so that the QuikPay units would function properly. Willson stated that his direct and indirect involvement in customer service for the QuikPay line also increased at this time.

Willson stated he was in frequent communication with King regarding the QuikPay acquisition from Datakey and the development of their new customer base. Willson said he discussed with King in detail what would be appropriate pricing for QuikPay repairs and equipment. The record contains evidence of an e-mail from King to Willson with the QuikPay pricing schedule. According to Willson, he and King discussed ways to minimize costs of the QuikPay units. For example, Willson stated that they jointly made the decision to discontinue about half of the QuikPay box styles previously available to customers so that they could cut down on Secure Data Systems' costs. Willson also stated that they discussed creating a new brochure to promote the QuikPay line to customers. "[B]etween helping customers and modifying boards and getting the units put together and tested so that [King] could sell those," Willson stated that when he had time, he also continued to work on developing the key dispenser-revalue station.

King testified that by the beginning of 2003, he had deliberately separated his QuikPay sales, maintenance, and its future development from his Washco carwash business and had moved all QuikPay business to Secure Data Systems. Around the same time, Willson developed a Web site for Secure Data Systems with e-mail accounts for King and Willson.

King continued to operate Washco as he had previously, selling and maintaining the non-QuikPay carwash systems and accessories. There is no allegation that Willson was ever involved in non-QuikPay Washco ventures.

King and Willson had difficulties with some of the inventory acquired from Datakey. The record contains a draft letter that King e-mailed to Willson, in which King expressed his frustration to Gardeen, who, as mentioned, was King's main liaison

with Datakey. Apparently in reference to himself and Willson, King repeatedly referred in the letter to "we" and "us." King stated that he would rather be writing a letter to Jennings thanking him for "the faith that he extended to us that we have the ability to make the QuikPay system work." But, the system had been "pieced mealed [sic]" to "us" and remained incomplete. King made several complaints and described some of the future challenges his acquisition would present:

> Regarding the [computer] software, because of licensing agreements, you told us that we had [to] go out and buy [a specific computer application]. We did and as you know it did not work. Now you are telling us that we are going to have to go out and buy [another computer application]. . . .
>
> . . . .
>
> You suggested that we get on with development of a new controller and write all new software. When the parts run out, end users will simply have to purchase new controllers and software. Development of a new controller and software will differently happen. . . .
>
> With the exception of the data back up problem in the [computer] software, the controller and firmware with the latest updates appear to be stable. On the other hand we have no idea what is going to surface down the road.

King reminded Gardeen that there were customers with substantial commitment to Datakey's key and that they "deserve better." King asked Datakey for more assistance and reiterated that "we are looking forward to a long and successful association with Datakey."

Jennings explained that when King took over the QuikPay system, Datakey had sent King compact discs with the source files and other information Datakey thought would be needed to support the system, but King was still having trouble getting things to run. Both Jennings and Gardeen testified that it was apparent that Willson was the person working with King to get the QuikPay equipment working. And there was substantial correspondence between Datakey and Willson regarding the QuikPay system. Eventually, Jennings sent an e-mail to Willson, copied to King, explaining that rather than trying to

figure out which file might still be missing from the compact discs sent to them, Datakey would simply rebuild the system on a computer and lend that computer to Willson as a reference tool. This was, in fact, done.

When Jennings was asked whether he knew who the owners of Secure Data Systems were, he answered that he "understood that . . . King and . . . Willson were involved in Secure Data Systems." Upon further questioning, Jennings testified, however, that it was "never clarified" whether both King and Willson owned Secure Data Systems or whether one worked for the other.

In May 2003, King and Willson went together to an international carwash convention in Las Vegas, Nevada. King suggested to Willson that he make up Secure Data Systems business cards for King and Willson. The cards presented Willson as "System Designer & Engineer" and King as "Sales." The cards described Secure Data Systems as carrying the "QuikPay Product Line." According to King, "you just simply don't go to a convention like that without a card telling people who you are." In an e-mail sent by Willson to King at the end of April, Willson asked King not to print up too many cards yet because the next month he was planning on having a second telephone line installed "specifically for Secure Data Systems so customers will have limited access to me as well," and he wished to add that number to his card.

After the Las Vegas trip, King and Willson had an argument about the Secure Data Systems Web site because Willson had made reference to a trademark name and logo on the site and King was concerned about legal liability. Willson stated that he became upset because of the way he felt he was being treated by King during the argument. After the argument, Willson sent an e-mail to King stating, "[R]egarding Secure Data Systems and our partnership, I have decided to take your suggestion and leave you in complete control and give you complete ownership." Both King and Willson testified, however, that they soon reconciled after this disagreement. They then continued with their relationship as before, apparently without King's ever objecting to Willson's characterization of their business relationship as a partnership, and himself as a co-owner.

By the spring of 2003, Willson explained that his work for Secure Data Systems consisted primarily of dealing with QuikPay maintenance and repair issues, although he continued to try to finish the key dispenser-revalue station whenever he had time. Willson made changes in the QuikPay software to fix some "annoy answers" and other problems that customers wanted fixed. Willson then placed the software "patch" on the Secure Data Systems' Web site for downloading by Secure Data Systems' customers. There were also firmware upgrades that had been designed by Datakey that had to be implemented. On one occasion, Willson had to recover data and repair a unit that had been struck by lightning.

Another maintenance job that Willson did was to continue to modify I/O boards. Willson explained that the "older style [of I/O boards] were burning out due to a transistor, a component of the board not being set up right." This particular modification had been designed by Datakey, and Willson only implemented it. By September, Secure Data Systems had hired another company to do the I/O board modifications because, as Willson explained, the boards took about 45 minutes each and there came to be too many of them.

Willson testified that King would call him regularly with any number of QuikPay maintenance problems. According to Willson, King was usually the direct contact with QuikPay customers. Willson would correct the issues during the evening and early morning hours and put the repair information onto the Secure Data Systems' Web site for King to look at the next morning. Willson stated that he also worked directly with QuikPay customers on occasion.

As early as June 2003, Willson had asked King to clarify what King thought Willson's priorities should be concerning his contribution to Secure Data Systems. King had asked Willson to deal with a customer complaint as to the failure of QuikPay's managing software to automatically record cash keys for accounting. In an e-mail to King, Willson explained that he would rewrite a portion of the software, but that these QuikPay maintenance issues were taking time away from developing the key dispenser-revalue station:

> We need to get the vending machine completed, but I get mixed signals from you alot [sic] as to what you want to do. (ie. [sic] Vending machine, expresskey patch and now this). I realize that they are all important and need to be add[re]ssed and taken care of, but we need to stop moving back and forth, finish one and move on to the next as we talked about before. Drop me a line and let me know what you think we need to be focusing on.

King replied:

> I don't intend to send mixed messages. I feel our priorities ha[ve] always been and should remain on the Revalue Station. We should follow up with a new controller, software and hand held read/writer. . . .
>
> This issue with this customer in Columbus[, Nebraska,] is not the first time we have heard this complaint. It is however the first time we have had a customer complain this strongly about it. Issues like this and the complaints that brought about the software patch, etc., arise routinely in the course of the day to day activities of doing business. We can not [sic] ignore these issues. We have to deal with them in a manner that allows us to stay focused and still do the best we can to deal with the complaints. It may mean that we can only address a giv[en] issue with a band aid [sic] or on a temporary basis. If it [is] something that we can not [sic] provide we then have no other choice but to advise the customer as such. If it is something that is going to take a lot of time then we need to value the importance while keeping our priorities in mind.
>
> I am going to continue to call you when these things come up. Again it is not by intention to change priorities. We need to discuss these issue[s], if we can do anything, the importance and how we want to handle what ever [sic] comes along.

The record contains 17 repair tickets dating from March to November 2003, totaling $4,150.77 in repairs done by Willson on QuikPay systems for various customers. King admits that either directly or indirectly, customers were billed off of these tickets that King obtained through the Secure Data Systems' Web site. Another bill is found in the record sent by King to

a client for $600.26 in controller repairs, which King told the client had been done by "Scott." At trial, Willson estimated that he had put at least 2,000 hours into QuikPay sales and maintenance and in developing the key dispenser-revalue station.

In correspondence with clients, King often referred to Willson as the person doing technical work for QuikPay. Willson also sent e-mails communicating directly with QuikPay clients on various issues. In an e-mail dated August 12, 2003, Willson describes himself as the software and hardware designer with Secure Data Systems and he refers to King as his "partner." The record contains correspondence between King and Willson discussing Secure Data Systems' purchases for QuikPay maintenance and development. In an e-mail from November 2003, King forwarded to Willson the price list for what he had been quoting customers for QuikPay repairs.

In October 2003, King sent an e-mail to a potential customer in which King referred to Willson as "the other half of Secure Data Systems." This potential customer had an old version of QuikPay, and King was trying to sell the owner updates that Willson, who "does all the programming," had made to the software and firmware. These updates, King explained, coupled with the necessary hardware updates, would resolve the owner's current complaints with his QuikPay system. King referred the customer to the Secure Data Systems' Web site for Willson's instructions as to how the owner should send his database in for updating.

Willson incurred out-of-pocket expenses in 2002, but those were apparently reimbursed by King. Willson stated that because these out-of-pocket expenses were relatively small, King had instructed him to make a list of those expenses so that King could claim them on his taxes and Willson would not have to worry about filing a special form. Willson was not aware that he was supposed to file a partnership tax form, and he never did so.

Again, in the first half of 2003, Willson testified that he incurred out-of-pocket expenses, and he stated that he did not always seek reimbursement for those expenses from King. It is undisputed that later that year, King gave Willson a credit card number and verification code so he could charge Secure Data

Systems' business to the card. It is unclear whether Willson believed the card was an official Secure Data Systems' card. It was, in fact, King's personal credit card that he had designated for Secure Data Systems' business. Willson used the card to purchase parts that he needed in working on QuikPay maintenance and in development of the key dispenser-revalue station. There is no evidence that Willson was required to get King's prior approval before incurring Secure Data Systems' related expenses.

When Willson was asked why he invested his time and expertise into QuikPay without any remuneration, he explained, "That was my contribution to the company. I mean that was my piece." Willson claimed that King periodically kept Willson informed about how much money was in the bank that had accrued in profits derived from QuikPay sales and maintenance. Willson alleged that sometime in 2003, he and King discussed distributing some of the profits through draws or bonuses at the end of the year.

Still, Willson "started getting uneasy." Willson explained that he "wasn't feeling comfortable continuing to repair controllers [and] create a vending machine when the only reassurance I had was, don't worry, I'm not going to leave you hanging." Willson contacted a law firm to draw up papers to formalize the partnership. These papers were never drafted. According to Willson, when he told King he was looking into creating a written agreement for their relationship, King "assured [him] that he was having his attorneys look at it," and King asked for his and his wife's Social Security numbers. Willson's wife testified at trial that she remembered when King asked for their Social Security numbers.

At the same time that Willson was seeking more formal guarantees of his partnership interest, King was expressing his impatience with the fact that Willson had not yet produced a key dispenser-revalue station. Willson's wife explained that shortly before the meeting, King had come over to their house to pick up something that Willson had worked on for QuikPay over the lunch hour and that King had complained about Willson's "dedication." She explained:

> I was very upset because at that time I wanted [Willson] to take our son to preschool and he couldn't go because he had to finish whatever it was [King] had him working on, something with the QuikPay. And I asked [King] how could you question his — you know, he's doing all — everything you ask him to do. He does everything that needs to be done. I didn't know of any incomplete things. Every time he had a chance, he was talking to [King] or getting things done that needed to be done with QuikPay.
>
> He never told [King] no. He didn't ask for any money, and I didn't understand how [King] could question [Willson's] dedication.

King and Willson had a meeting with their wives to discuss their respective concerns. Apparently, their respective unease was at least temporarily resolved. Willson's wife described the meeting as follows:

> And they were mainly focused on where they were going, the revalue station was their key. That's what they wanted to do. And [King] kept staying [sic], well, we have to make our customers happy. We have to get the QuikPay working. If that doesn't work, then you know the revalue station is — you know, he said we had to make our customers happy. And so he was telling [Willson] this as we were sitting at [a restaurant], and I thought the meeting went well. We had talked again about officers or I don't know how the business works. I was just trusting that [Willson] would let me know.

On cross-examination, Willson's wife clarified that when King was discussing keeping customers happy, he was referring to the existing QuikPay system and not the key dispenser-revalue station Willson was trying to develop. Willson similarly testified that at the meeting, they discussed "officers or something like that. For a corporation, I don't really understand all how that works, but at that time I felt at ease."

During this general time period, King discovered that the name "Secure Data Systems" had already been taken for incorporation and this was discussed with Willson. The name "KeyTronics" was suggested by Willson's wife. In December 2003, Willson developed a new Web site for "KeyTronics." Willson then

moved over the "service tracker" program and other information from the previous Secure Data Systems' Web site to the new Web site for "KeyTronics."

The record contains an e-mail dated December 13, 2003, in which King tells Willson that he had to cancel the "Secure Data [credit] Card" in order to get the name on the card changed to "KeyTronics." Willson sent King a list of his understanding of what the current objectives were for "KeyTronics." This list included completing projects relating to the development of the key dispenser-revalue station as well as certain goals relating to sales, inventory, and repairs for the existing QuikPay system. Willson testified that he was still optimistic about getting a key vending machine finished but that his relationship with King was deteriorating. Willson testified that "[w]e were arguing more, and nothing was getting done as far as paperwork."

King and Willson had another meeting around the end of December and agreed to end their relationship and any joint QuikPay or key dispenser-revalue station activities. Approximately 2 weeks after this meeting, King called Willson and offered to compensate him for the time he had spent in maintaining or repairing QuikPay. Willson refused and brought this action instead.

The record indicates King currently conducts QuikPay business under "Key-Tronics, Inc.," which is registered in King's name alone. Its sole line of business is the QuikPay system. King pays two independent contractors to assist him in installation, troubleshooting, and repairs.

King generally denied at trial any partnership relationship with Willson. King minimized Willson's assistance with regular QuikPay business and pointed out that Willson was never able to produce a marketable key dispenser-revalue station. King conceded that Willson had repaired 40 individual QuikPay controllers. He also noted that Willson had looked into some "glitches" in QuikPay's software package and had worked on an "LCD design" to go with the QuikPay controller. King indicated that Willson had worked on some I/O boards. Still, King could not believe that Willson had invested 2,000 hours in QuikPay or the key dispenser-revalue station, explaining, "[Willson] played softball, went out and helped his dad two nights a week, took

Japanese lessons. I truly don't know where you would come up with those kind of hours, the activity that he was doing."

King denied any agreement to share profits and equally denied any agreement to compensate Willson as an employee or independent contractor. King presented no explanation as to why, without any promise of remuneration, Willson contributed to King's QuikPay profits. King simply stated that the QuikPay business was solely his. He was distributing and maintaining QuikPay before he met Willson, and he asserted that the acquisition of Datakey customers and inventory did not significantly alter his business.

King did not recall asking for either Willson's or Willson's wife's Social Security number. He did vaguely admit to, at some point, telling Willson or his wife that he had spoken with an attorney about incorporating. King generally denied consulting with Willson about pricing for QuikPay or otherwise sharing in control of the QuikPay business. King emphasized that any work Willson did, which, again, he considered minimal, was always at King's request.

In its order, the district court, as the trier of fact, concluded: "[T]he evidence indicates that Willson and King pooled resources, money and labor." But, "the parties never entered into any specific agreement which would establish a partnership." Even if a partnership had been established, however, the court concluded that there would be no profits from the joint venture because "nothing in the evidence reflects that [King] ever committed his existing business and its related assets to the development efforts for the key system."

## ASSIGNMENTS OF ERROR

Willson assigns that the district court erred in (1) finding that there was no partnership under Nebraska law and (2) finding that no dissolution and accounting were necessary.

## STANDARD OF REVIEW

[1,2] In considering the proper standard of review for the question of the existence of a partnership, we apply the standard

of review generally applicable to the underlying action.[2] An action for the dissolution of a partnership and an accounting between partners is one in equity. As such, in this case, the trial court's determination as to whether a partnership was established is reviewed de novo on the record.[3]

## ANALYSIS

This case is governed by the Act which was adopted after the passage of the revised Uniform Partnership Act.[4] Section 67-410(1) of the Act defines that a partnership is formed by "the association of two or more persons to carry on as co-owners a business for profit" and explains that this is true "whether or not the persons intend to form a partnership."

[3] Obviously, the relationship between King and Willson is "of two or more persons." In addition, whether the business of QuikPay maintenance, or even the development of the never-produced key dispenser-revalue station, qualifies as a business "for profit" is not in issue. It is not essential that the business for which the association was formed ever actually be carried on, let alone that it earn a profit. Rather, a business qualifies under the "business for profit" element of § 67-410(1) so long as the parties intended to carry on a business with the expectation of profits.[5]

Still, Willson admits he is not pursuing an action for an accounting of a partnership that would be limited to the development of a key dispenser-revalue station. That product was

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[2] See, *Lewis v. Gallemore*, 173 Neb. 211, 113 N.W.2d 54 (1962). Cf. *South Sioux City Star v. Edwards*, 218 Neb. 487, 357 N.W.2d 178 (1984). See, also, *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006); *Gast v. Peters*, 267 Neb. 18, 671 N.W.2d 758 (2003); *Bass v. Dalton*, 213 Neb. 360, 329 N.W.2d 115 (1983); *Byram v. Thompson*, 154 Neb. 756, 49 N.W.2d 628 (1951).

[3] See, e.g., *Lewis v. Gallemore, supra* note 2.

[4] Unif. Partnership Act (1997) § 101 et seq., 6 U.L.A. 58 et seq. (2001).

[5] See, *Thompson v. McCormick*, 149 Colo. 465, 370 P.2d 442 (1962). See, also, 1 Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 2.06(c) (2007); J. William Callison & Maureen A. Sullivan, Partnership Law and Practice, General and Limited Partnerships, § 5:10 (2006).

never produced and did not independently garner any profits to account for. We are instead asked to determine whether King and Willson were partners in an enterprise that involved both the development of the key dispenser-revalue station and the sales and maintenance of the regular QuikPay line. If so, Wilson claims that King must account to Willson for any profits relating to all QuikPay business.

The elements disputed by the parties are whether there was an "association" formed for QuikPay business, and whether such association, if created, was as "co-owners." The existence of a partnership is a question of fact under the evidence.[6] Because this is an action for an accounting, which lies in equity, we conduct our review de novo on the record, reaching a conclusion independent of the findings of the trial court.

### Burden of Proof

[4] The burden of establishing the partnership is upon the party asserting that such a relationship exists.[7] We have said that where the plaintiff is alleging a partnership with the defendant, which the defendant denies, the plaintiff must establish the existence of the partnership by clear and convincing evidence. In contrast, where a third party to the alleged partnership has brought the action, the third party need only prove the existence of a partnership by a preponderance of the evidence.[8] Thus, we have required more convincing evidence to prove the existence of a partnership where the alleged partners are the only litigants than where the controversy is between a third party and the partners.[9]

In *In re Estate of Wells*,[10] we were not presented with a controversy between a third party and the partners. Furthermore, the plaintiff in that case was one of the alleged partners. Yet, we held that the plaintiff's burden of proof to establish the partnership was by a preponderance of the evidence. We found this lower

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[6] *In re Estate of Wells*, 221 Neb. 741, 380 N.W.2d 615 (1986).

[7] *Id.*; *Johnson v. Graf*, 162 Neb. 396, 75 N.W.2d 916 (1956).

[8] See *In re Estate of Wells, supra* note 6.

[9] See, e.g., *Johnson v. Graf, supra* note 7.

[10] *In re Estate of Wells, supra* note 6.

standard of proof applicable because the other alleged partner was deceased and the action was against the State contesting inheritance taxes. As such, we characterized the plaintiff's action as falling under the third-party rule.

[5] We have never explained, nor is there any reasoning to support, the confusing myriad of standards we have applied to what is, effectively, the same legal issue. Thus, we believe that the tenuous distinction between actions by alleged partners inter sese and actions by a third party against the alleged partnership should be abolished. In civil actions, a preponderance of the evidence is generally all that is required to sustain the claim of a party.[11] Exceptions to this standard for civil actions are uncommon[12] and are generally reserved for cases "where particularly important individual interests or rights are at stake," such as termination of parental rights, involuntary commitment, and deportation.[13] While a preponderance of the evidence standard allows "both parties to 'share the risk of error in roughly equal fashion.' . . . Any other standard expresses a preference for one side's interests."[14]

Generally, in both law and equity, proof of alleged contracts between the parties need only be shown by a preponderance of the evidence.[15] We see no reason to hold out a special standard for partnership relations that favors the party denying the relationship over the party asserting that the partnership exists. And the logic behind imposing a higher burden of proof in actions between alleged partners as opposed to actions by third parties against an alleged partnership has never been fully articulated.

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[11] *State v. Neimer*, 147 Neb. 284, 23 N.W.2d 81 (1946). See, also, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (superseded on other grounds by Civil Rights Act of 1991).

[12] *Price Waterhouse v. Hopkins, supra* note 11.

[13] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983).

[14] *Id.*, 459 U.S. at 390.

[15] See, e.g., *Lewis v. Poduska*, 240 Neb. 312, 481 N.W.2d 898 (1992); *Hersch Buildings, Inc. v. Steinbrecher*, 198 Neb. 486, 253 N.W.2d 310 (1977); *Dunbier v. Rafert*, 170 Neb. 570, 103 N.W.2d 814 (1960); *Herrin v. Johnson Cashway Lumber Co.*, 153 Neb. 693, 46 N.W.2d 111 (1951).

By eliminating any common-law distinctions as to the burden of proof between actions alleging a partnership inter sese and actions by third parties, we bring greater predictability and consistency to partnership determinations.

In our de novo review, we thus determine whether Willson established by a preponderance of the evidence that he and King were partners in a business that entailed both the development of the key dispenser-revalue station and regular QuikPay sales and maintenance.

## ASSOCIATION

We first consider whether King and Willson formed an association. King correctly points out that inherent to the term "association" is the idea that the relationship between the "two or more persons" be intentional.[16] King argues that no partnership was formed because he never intended to form a partnership relationship with Willson. "In the domain of private law the term association necessarily involves the idea that the association is voluntary."[17] It is perhaps for this reason that the district court found it significant that King and Willson "never entered into any specific agreement which would establish a partnership."

[6] But, as § 67-410(1) explicitly states, the intent necessary to form an association does not refer to the intent to form a partnership per se. There is no requirement that the parties have a "specific agreement" in order to form a partnership. People do not become partners when they attain co-ownership of a business for profit through an involuntary act.[18] But, if the parties' voluntary actions form a relationship in which they carry on as co-owners of a business for profit, then "they may inadvertently create a partnership despite their expressed subjective intention not to do so."[19] Intent, in such cases, is still of prime concern,

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[16] See Bromberg & Ribstein, *supra* note 5, § 2.05(a).

[17] Unif. Partnership Act (1914) § 6, comment 1(1), 6 U.L.A. 394 (2001).

[18] Bromberg & Ribstein, *supra* note 5, § 2.05(a).

[19] Unif. Partnership Act (1997) § 202(a), *supra* note 4, comment 1 at 93. See, also, *Bass v. Bass*, 814 S.W.2d 38 (Tenn. 1991); 59A Am. Jur. 2d *Partnership* § 139 (2003).

but it will be ascertained objectively, rather than subjectively, from all the evidence and circumstances.[20]

Because of this, King's focus on his intent to form a corporation, as opposed to a partnership, does more to prove an intent to form the requisite association than to disprove it. It is, in fact, not unusual for courts to find a partnership relationship between parties that were operating with the intent to form a corporation and to specifically avoid a partnership relationship.[21] Even where a corporation has successfully been formed, courts have found a partnership relationship between the shareholders when the corporation is a mere agency for convenience in carrying out the joint venture or partnership.[22]

In *Hauke v. Frey*,[23] we found sufficient evidence of a partnership relationship between two parties who admittedly had once intended to form a corporation, but had never done so. The plaintiff in *Hauke* was the sole titleholder of the business property, which operated as a bowling alley, and he claimed he had no partnership with the defendant who was allegedly in wrongful possession of his property. According to the plaintiff, the defendant was merely an employee who managed the business in return for a set monthly wage. While the receipt of payment for services could be interpreted against a partnership relationship, there was also evidence that the defendant had purchased some equipment for the business and that the defendant was a mandatory signatory on a partnership bank account used for business expenses. We concluded although there was not an agreement containing complete details either of organization or of functions after organization, the conduct of the parties

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[20] See, *In re Estate of Wells*, *supra* note 6; *South Sioux City Star v. Edwards*, *supra* note 2.

[21] See, e.g., *Wine Packing Corp. of Cal. v. Voss*, 37 Cal. App. 2d 528, 100 P.2d 325 (1940).

[22] *Arditi v. Dubitzky*, 354 F.2d 483 (2d Cir. 1965); *Bartomeli v. Bartomeli*, 65 Conn. App. 408, 783 A.2d 1050 (2001); *Koestner v. Wease & Koestner Jewelers*, 63 Ill. App. 3d 1047, 381 N.E.2d 11, 21 Ill. Dec. 76 (1978); *Elsbach v. Mulligan*, 58 Cal. App. 2d 354, 136 P.2d 651 (1943).

[23] *Hauke v. Frey*, 167 Neb. 398, 93 N.W.2d 183 (1958).

implied a partnership that was to continue until a corporation could be organized to take its place.

In considering the parties' intent to form an association, it is generally considered relevant how the parties characterize their relationship or how they have previously referred to one another.[24] The joint use of a business name is evidence of an association.[25] This is especially true when the business name is composed of the parties' names or initials.[26]

It is undisputed that King and Willson discussed the fact that Secure Data Systems had the initials of Scott, Don, and Scott. Granted, at its inception, Secure Data Systems was an association among three parties focused on the limited task of creating a key dispenser-revalue station. But, despite King's claim that the acquisition of all of Datakey's QuikPay inventory and customer base was insignificant, after this occurred, King removed any QuikPay operations from his Washco business. He instead began to conduct all QuikPay business exclusively through Secure Data Systems. Willson was clearly associated with King in that venture.

At that point, in e-mail correspondence with Datakey in regard to various complaints with the QuikPay system, King no longer referred to himself in the first person singular, but instead in first person plural, as "us" or "we." Business cards were created for King and Willson describing their respective positions in Secure Data Systems. King and Willson went as joint representatives of Secure Data Systems to a Las Vegas carwash convention. King and Willson worked together both in servicing the QuikPay line, assembling and repairing Datakey's old inventory, and developing the key dispenser-revalue station. Various e-mails to customers and to Datakey evidence their joint efforts in this regard. To King and to others, Willson

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[24] *Mardanlou v. Ghaffarian*, 135 P.3d 904 (Utah App. 2006).

[25] See, e.g., *Van Dyke v. Bixby*, 388 Mass. 663, 448 N.E.2d 353 (1983); *Beck v. Indiana Surveying Co.*, 429 N.E.2d 264 (Ind. App. 1981).

[26] See, e.g., *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163 (Tex. 2007); *Landise v. Mauro*, 725 A.2d 445 (D.C. 1998); *Grissum v. Reesman*, 505 S.W.2d 81 (Mo. 1974); *Asamen v. Thompson*, 55 Cal. App. 2d 661, 131 P.2d 841 (1942).

referred to himself and King as partners. Specifically in regard to ventures involving the regular QuikPay system, King referred to Willson as "the other half of Secure Data Systems." We believe the evidence is clear that King and Willson formally associated to develop a key dispenser-revalue station and that further, this association expanded in scope to encompass all QuikPay operations.

### Co-ownership

Still, King asserts that any reference he made to Willson as the "other half of Secure Data Systems" was an insignificant figure of speech. Most importantly, according to King, there was no partnership because Willson never had co-ownership of the QuikPay business. King claims that he started selling and maintaining QuikPay by himself and asserts that he maintained full control of that business line. According to King, Willson simply did what King asked him to—apparently for free.

[7-9] Being "co-owners" of a business for profit does not refer to the co-ownership of property,[27] but to the co-ownership of the business intended to garner profits. It is co-ownership that distinguishes partnerships from other commercial relationships such as creditor and debtor, employer and employee, franchisor and franchisee, and landlord and tenant.[28] Co-ownership generally addresses whether the parties share the benefits, risks, and management of the enterprise such that (1) they subjectively view themselves as members of the business rather than as outsiders contracting with it and (2) they are in a better position than others dealing with the firm to monitor and obtain information about the business.[29]

[10] The objective indicia of co-ownership are commonly considered to be: (1) profit sharing, (2) control sharing, (3) loss sharing, (4) contribution, and (5) co-ownership of property.[30] The five indicia of co-ownership are only that; they are not all necessary to establish a partnership relationship, and no single

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[27] See, § 67-410(3); 59A Am. Jur. 2d, *supra* note 19, § 140.

[28] See Callison & Sullivan, *supra* note 5, § 5:11.

[29] Bromberg & Ribstein, *supra* note 5, § 2.14.

[30] *Id.*; Callison & Sullivan, *supra* note 5, § 5:11.

indicium of co-ownership is either necessary or sufficient to prove co-ownership.[31]

The district court found that King and Willson had "pooled resources, money and labor." This is significant evidence of contribution. The record demonstrates that Willson contributed his time and expertise not only to the business of developing the key dispenser-revalue station, but also to the continued operations of the regular QuikPay product line. And even if Willson had not more directly contributed to regular QuikPay business, we again note that the business of QuikPay and the business of developing a peripheral product that would ensure QuikPay's continued viability in the marketplace were inextricably commingled. This was especially true with regard to Willson's contribution when King emphasized that Willson had to help keep the QuikPay system running because, otherwise, the development of the key dispenser-revalue station would lose its customer base and become irrelevant.

The continuing investment of one's labor without pay is generally considered a strong indicator of co-ownership.[32] It is evidence that, as Willson testified he explicitly understood, the party is not an outsider contracting with the business.[33] Valid consideration for an ownership interest in a partnership may take the form of either property, capital, labor, or skill, and the law does not exalt one type of contribution over another.[34]

In this case, Willson contributed his time and expertise without any compensation for approximately 1 year. Conservatively, Willson estimated his contribution as totaling over 2,000 hours. King did not present evidence of how many hours he had spent in the QuikPay venture. But more importantly, we conclude on our review of the record that without Willson's technical

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[31] See Bromberg & Ribstein, *supra* note 5, § 2.07(a).

[32] See, e.g., *Schymanski v. Conventz*, 674 P.2d 281 (Alaska 1983); *Huffman Technical Drilling, Inc. v. Smith*, 424 So. 2d 435 (La. App. 1982).

[33] Bromberg & Ribstein, *supra* note 5, § 2.07(c).

[34] *Kennedy v. Miller*, 221 Ill. App. 3d 513, 582 N.E.2d 200, 163 Ill. Dec. 934 (1991); *South Sioux City Star v. Edwards*, *supra* note 2; *Cutler v. Bowen*, 543 P.2d 1349 (Utah 1975); *Chaiken v. Employment Security Commission*, 274 A.2d 707 (Del. Super. 1971); 59A Am. Jur. 2d, *supra* note 19, § 95.

assistance, King would have been unable to continue QuikPay's viability after Datakey abandoned the product. That King could have dealt with certain issues by hiring contractors or employees is irrelevant. He chose not to do so—presumably because the promise of the key dispenser-revalue station made a partnership relationship more worthwhile—and saved himself the expense of paying for this labor.

We also find that despite King's protestations to the contrary, the evidence shows that King and Willson shared control over QuikPay business. We note that control is "elusive because of the many gradations of control and because partners often delegate decision-making power."[35] Still, Willson testified that he and King consulted with each other over what appropriate pricing would be as they picked up Datakey's equipment and customers. This is evidenced by an e-mail of the price list that King sent to Willson. Under King's theory of the case, the e-mail would have been completely unnecessary, because according to King, Willson contributed very little and had no direct contact with customers or their billing.

Willson testified that he and King made joint decisions to cut certain costs. Willson set up the invoice system they used to bill QuikPay customers, and there is no indication that such a system was anything other than that of Willson's independent initiative and design. Willson made technical decisions on how best to assemble, repair, or maintain various aspects of the QuikPay system. The June 2003 e-mail written by King illustrates King's understanding that he and Willson would jointly address QuikPay customer issues as they arose and jointly evaluate Secure Data Systems' priorities as they went along.

Willson also testified that he had an agreement with King to share profits, although King denies this. Of the five indicia of co-ownership, profit sharing is possibly the most important, and the presence of profit sharing is singled out in § 67-410(3)(c) as creating a rebuttable presumption of a partnership.[36] However, what is essential to a partnership is not that profits actually be

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[35] Bromberg & Ribstein, *supra* note 5, § 2.07(a) at 2:79.

[36] See, also, *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996); *Frisch v. Svoboda*, 182 Neb. 825, 157 N.W.2d 774 (1968).

distributed, but, instead, that there be an interest in the profits.[37] Willson's testimony that they agreed to share in the profits of the business is, in light of all the evidence, simply more credible than King's statement that compensation "was never discussed." And even King vaguely admits that they had an understanding to share profits of the key dispenser-revalue station, if that were developed. It seems reasonable to assume that this same understanding would apply to Willson as his participation and the scope of the venture expanded to encompass all QuikPay business.

We do not find any evidence that King and Willson had an agreement for loss sharing. But we find this of little import, since purported partners, expecting profits, often do not have any explicit understanding regarding loss sharing.[38] Likewise, although King and Willson admittedly do not own any joint property, in an informal relationship, the parties may intend co-ownership of property but fail to attend to the formalities of title.[39] Moreover, in this case, it is unclear that there is much QuikPay "property" at all. Certainly, as King's counterclaim alleged, Willson has possession of some QuikPay equipment. To the extent that a bank account is property, we note that although Willson had delegated financial matters to King and was not a signatory to the bank account where Secure Data Systems' revenues were deposited, Willson testified that King did keep him abreast of the financial status of that account. Willson believed he had an ownership interest in the funds in that account.

We conclude that the objective, as well as subjective, indicia are sufficient to prove co-ownership of the business of selling, maintaining, and developing QuikPay. Having already concluded that there was an association for the same, we conclude that Willson proved that he and King had formed a partnership for the business of selling, maintaining, and developing QuikPay.

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[37] See, Bromberg & Ribstein, *supra* note 5, §§ 2.06(c) and 2.07(b); Callison & Sullivan, *supra* note 5, § 5:10.

[38] See Bromberg & Ribstein, *supra* note 5, § 2.07(d).

[39] Bromberg & Ribstein, *supra* note 5, § 2.07(f).

## CONCLUSION

Because Willson has proved a partnership relationship with King, he is entitled to a winding up and an accounting in accordance with the Act. The district court erred in concluding otherwise. Accordingly, we reverse the decision and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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